Supreme Court, U.S.
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In The

Supreme Court of the United States

WINFORD KENT BISHOP,

Petitioner,

v.

UNITED STATES DISTRICT COURT,

Respondent.

On Petition For Writ Of *Certiorari* To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED FOR REVIEW

Did the courts below err in construing *Selling v. Radford*, 243 U.S. 46 (1917), to allow it to disbar Petitioner from the District Court for the Northern District of Georgia based on his Georgia state disbarment where the only evidence to support that result was that (a) the state "served" Petitioner with the unsworn grievances, but he did not receive a copy, and (b) the state made no finding of, nor was there any proof or evidence of, (i) misconduct by him or (ii) even a knowing refusal to respond to bar charges?

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner, a member of the bar of the Supreme Court of the United States, of the United States Courts of Appeals for the Second and Fourth Circuits, of the United States District Courts for the Eastern and Southern Districts of New York, and of the State of New York, respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit. The decision below affirms Petitioner's disbarment by the District Court for the Northern District of Georgia based on an improper application of *Selling v. Radford*, 243 U.S. 46 (1917), dealing with state disbarment for misconduct, whereas the Georgia disbarment was without a finding of misconduct. This Court should grant *certiorari* because the Eleventh Circuit's judgment conflicts with other federal decisions concerning state action against lawyers not involving misconduct.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unreported and reproduced in the Appendix at 1a. The order of the district court disbarring Petitioner is set out at 3a. The final report of the district court's disciplinary committee is found at 8a. Judge Vining's conflicting order is copied at 44a.

JURISDICTION

The opinion of the court of appeal affirming the district court's disbarment was entered on October 2, 2002 (1a). The Eleventh Circuit clerk extended the time to seek rehearing, and Petitioner filed a timely petition for panel rehearing and rehearing *en banc* on December 1, 2002. The court of appeals denied rehearing on January 31, 2003 (49a, 50a). This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states, in relevant part: "No person shall ... be deprived of life, liberty, or property, without due process of law ...." The Fourteenth Amendment states, in relevant part: "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Factual Background

Petitioner was admitted to the State Bar of Georgia and the bar of the district court in 1971 after being admitted to the New York bar in 1968 and in 1970 to the bars of the Court of Appeals for the Second Circuit and District Courts for the Eastern and Southern Districts of New York (R5-14-2).

In 1989, a client of Petitioner's in 1971 ("1971 client") entreated Petitioner to assist his brother in a child custody case, notwithstanding adverse factual findings against the brother by a DeKalb County, Georgia Superior Court judge in the original divorce and custody action (R5-16-7 (39)). In time the brother terminated the representation of lawyer R.J. "Cummings" (whom Petitioner had never heard of) and another and retained Petitioner. In January 1991, after losing an emergency motion before the same judge to change custody, the brother terminated Petitioner's representation owing some $2,000 in attorney's fees. He addressed written charges to Petitioner that he had overcharged him, engaged in professional malpractice, and perpetrated ethical violations, and stated that for these reasons he would insure that his brother never again recommended

Petitioner as a lawyer (R5-16, ex. 3; T93 96). Under Georgia Bar Rule 4-102, Standard 28 (promulgated by the Georgia Supreme Court ("Georgia court") in 1990-91), a lawyer has a right to defend himself and collect his fee; and Petitioner defended himself in a 17-page letter, dated January 29, 1991, addressed solely to the brother and hand-delivered by Petitioner into the brother's mailbox the next day (R6-17: filed under seal). Petitioner made no other dissemination of that letter or its contents, except to the bar in response to the brother's charges (R5-14-4 (24)). The brother did not identify his replacement lawyer until his letter of February 4, 1991, received February 8, and it was R.J. "Comins," a name listed on a different page (p. 42) in the *State Bar of Georgia Directory & Handbook, 1990-91* from "Cummings" (p. 43) (R5-16, ex. 4).

On February 4, 1991, the brother filed a petition for fee arbitration (R6-20, ex. C). In April 1991, the 1971 client contacted Petitioner on behalf of his brother to settle the billed fee (R5-16-8 (40-43)). Under Georgia Bar Rule 4-102, Standard 40 (1990-91), a lawyer may accept a third-party payment from "the client's representative." On April 19, 1991, after calling Petitioner four times, the 1971 client mailed a check for fees billed through January 2, 1991, that Petitioner deposited (R5-16-8 (44)). On May 17, 1991, Petitioner filed a response to the fee petition (R6-20, ex. F). On July 12, 1991, the fee arbitrators -- two members of the bar and a C.P.A. partner of KPMG, Inc. - "find and award as follows: [Petitioner] is not required to return any monies to [brother] and is entitled to all fees collected" (R6-20, ex. J). In early January 1992, the bar informed Petitioner by letter dated December 31, 1991 (R6-20, ex. K), that the brother had sought recon-

sideration, and the arbitrators had ruled on August 27, 1991:

> "Having reviewed the issues raised by [brother] in his letter of July 15, 1991 addressed to Rita Payne, Fee Arbitration Coordinator, State Bar of Georgia, we are of the opinion that none of said issues change or effect the decision of the panel dated July 12, 1991 and therefore, our original decision stands as issued. We would further point out that the panel found the fees charged by [Petitioner] to [brother] to be reasonable and appropriate and the propriety of any third party payment made on behalf of [brother] to [Petitioner] was not properly before the panel." (R6-20, ex. L).

Shortly after receiving the July 12, 1991 arbitration result, the brother filed on July 24, 1991, a grievance against Petitioner with the bar (Final Rep., Att. 1) in a form suggesting that it was prepared with legal assistance (R5-16-10 (54)). His attorney, R.J. Comins (Final Rep. Att. 1), who also represented Petitioner's ex-wife in unrelated litigation (R5-14-4 (25)), also filed a grievance making the same allegations (Final Rep., Att. 1). NEITHER GRIEVANCE WAS UNDER OATH. *Cf. Ex parte Burr*, 9 Wheat. 529, 530 (1824) (agreeing with Burr that misconduct charges must be under oath). Petitioner filed responses to both grievances with the bar (R5-16, ex. 24, 26). In July 1991, and thereafter, Petitioner discussed the grievances with Assistant General Counsel Cohen, informed him that he had relocated to Dawson County, Georgia and received a promise that he would be called if there were further developments (*e.g.*, T93 98 (3)). On October 4, 1991,

Petitioner paid delinquent bar dues to Bar Membership Coordinator Gayle Baker (T93 279 (6)), obtaining remission of penalty for late payment due to announced relocation to Dawson County (R5-14-3 (17); T93 280 (25)) and a receipt that is in the record (R5-14, ex. B; T93 280 (9); D-19). Ms. Baker wrote down the new information and said she would make the changes in bar records (T93 29 (17), 271 (15)). She failed to do this, the information was purged (T93 39(6)), but at all times the bar had Petitioner's telephone number (R5-14-3 (18, 19), ex. D) which remained in service by remote call-forwarding (T93 322-23, 310). The Dawson County post office (R5-13) and sheriff's department (R5-12) knew where Petitioner resided (R5-14-22, ex. F); and in fact Ms. Comins procured service of process on him in Dawson County in June 1992 in unrelated proceedings (R5-14, ex. E).

The next thing Petitioner heard about the grievances was contained in a front-page-referenced newspaper article announcing his disbarment by default by the Georgia court that he read in a law office on January 20, 1993, while waiting to go to lunch with a colleague (R5-14-3 (23)). Research disclosed that the bar had attempted to notify Petitioner at his old address, but he did not receive mailed notice because he had moved and was sharing a post office box with two other people, one of whom was operating a business from the box; a bar employee personally knew as early as late January 1992, that he was not at the old address; and in late July 1992, Assistant General Counsel Davis telephoned the post office why it had not returned a mailing to Petitioner (T93 64 (4)) when he could have just as easily telephoned Petitioner that the bar was

trying to disbar him. The Georgia Code of Professionalism contemplates as much (R7-23-106).

Two days after he read about his disbarment, Petitioner moved to vacate the Georgia disbarment and to reopen the proceedings (17a). In response, the Georgia court "temporarily" vacated the disbarment and referred the matter to a special master for consideration of the "sole issue" whether Petition had been properly served. The special master found that service was proper but, nonetheless, held that the bar had denied him "due process of law" and recommended that the "disbarment be set aside and that [Petitioner] be allowed to address the charges against him." *In re Bishop*, 442 S.E.2d 734, 735 (Ga. 1994). The special master found as fact that (1) Petitioner's testimony was credible that he did not see any slips in the post office box;[1] that he did not have personal knowledge of the Notices of Investigation, the Notice of Discipline,[2] or the disbarment until he read the newspaper (19a); (2) Petitioner "came in and

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[1] "I will also say that when Mr. Bishop tells me he did not have any knowledge of this proceeding, and that he didn't ever see any slips in those boxes, I'll be totally candid with you, I believe him." (T93 330 (19-23)).

[2] Notice of Investigation and Notice of Discipline are documents authorized by the Investigative Panel of the Georgia State Disciplinary Board. The Investigative Panel which directs the Georgia bar's general counsel to issue and serve said notices, is an investigative body, akin to a grand jury; it does not consider mitigating evidence, nor afford a respondent lawyer or his counsel an opportunity to attend any deliberation, which does not occur where there is no response to mailed Notice of Investigation. A Notice of Discipline is merely a charging document issued by the general counsel at the panel's request when a lawyer does not respond to the Notice of Investigation. *See* R7-28, ex. 3.

vigorously opposed - well, defended himself in the fee arbitration, won, won, won, won. I mean he certainly wasn't running from a fight he couldn't win because he won it." (T93 331 (5-11)); and (3) Petitioner had "made a reasonable effort to notify the State Bar of his change of address ... and ... [he] thought the State Bar had his new address" (Final Report, ex. 6 (21)).

The Review Panel of the State Disciplinary Board, whose findings of fact are "conclusive" (Bar Rule 4-219 (a) (1990-91)), adopted the special master's findings of fact and conclusions of law, determined there had been a denial of "due process of law," and also recommended that Petitioner be permitted an opportunity to answer the grievances (19a).

The Georgia court, however, rejected these recommendations, 4 to 3, and again ordered Petitioner's disbarment, without considering the merits of the grievances against him. *In re Bishop*, 442 S.E.2d at 735. Although recognizing uncontradicted evidence that Petitioner lacked knowledge of bar proceedings, the Georgia court infers that he "deliberately ignored the notices."[3] The Georgia court refers to "numerous instances of misconduct set forth in the Notices of Investigation," but in fact no instances are listed, only standards allegedly violated (R7-28, ex. 1, 2), and there is not in the state record any evidence of misconduct, and the unsworn grievances are directly contradicted by the fee arbitration decision. *See Sweeney v. Athens Reg. Hosp. Auth.*, 917 F.2d 1560, 1573 (11th Cir. 1990)

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[3] This statement is impermissible because the Georgia Constitution (Art. VI, Sec. VI, Par. II) provides that the Georgia court is an appellate court; and thus an inference contrary to uncontradicted evidence is outside its jurisdiction. *Cf. Chambers v. Navarre*, 498 S.E.2d 173 (Ga.App. 1998).

(Georgia law disallows recovery of an attorney's fee for misconduct in representing a client).

Petitioner sought post-judgment relief in the Georgia court after discovering in its files (made available to him for copying) internal memoranda that the Georgia court had delayed decision in his case while the court amended the bar rules with the assistance of the bar to provide, *inter alia*, that (1) use of a post office box is a waiver of personal service,[4] (2) notice to anyone other than the bar's membership department is ineffective, and (3) failure to respond to a Notice of Discipline is a default (R3-27).[5] Petitioner filed in the Georgia court petitions for writ of *habeas corpus* and *coram nobis*, and in the Supreme Court of the United States a petition for writ of *certiorari*, all of which were denied (21a; 22a). Thus, the state disbarment was finalized without the benefit of Petitioner's answers to the unsworn grudge grievances (R5-16, ex. 24, 26), or any adversary proceeding of any kind, and was unfair.[6]

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[4] At common law Georgia attorney disciplinary cases were initiated by personal delivery. *See Strickland v. Willingham*, 175 S.E. 605 (Ga.App. 1934)..

[5] Georgia bar rule 4-102, Standard 68 (1990-91) provides that punishment for not responding to a notice of investigation is public reprimand, not disbarment.

[6] "In many [disciplinary] cases there are allegations of bias or challenges to the disciplinary and admission rules [note om.]. Although these allegations may prove unfounded, there is a sufficient basis for questioning whether a state's highest court can provide the dispassionate resolution that ought to be required when no other judicial review commonly occurs [note: *See Guarino v. Larsen*, 11 F.3d 1151, 1159 n.4 (3rd Cir. 1993) "(noting that 'when a court makes a decision regarding the legality of its own actions, it may be too biased to justify abstention by the federal courts even if its action are considered adjudicative')"] *** Doubt should

District Court Proceedings

After Petitioner's initial disbarment by the Georgia court on January 8, 1993 (24a), the Georgia court (23a) and bar (T93 270 (13)) notified the district court intending and expecting federal disbarment.[7] Without notice to him or opportunity to be heard, Tidwell, J. disbarred Petitioner on February 4, 1993 (R1-1). Petitioner filed a motion to vacate based on the Georgia court's February 18, 1993 temporary *vacatur* of the initial disbarment (R1-2). Tidwell, J. vacated the order on February 25, 1993 (R1-3; 24a). After Petitioner's second disbarment on April 18, 1994, the Georgia court and bar notified the district court; and without notice or firm date for hearing, Evans, J. suspended him from practice on June 4, 1994 (R1-4; 55a). He filed a motion showing good cause not to disbar, the "intrinsic" state record, and requested an evidentiary hearing and expedited treatment (R1-5). O'Kelley, J. disbarred him on October 12, 1994 (R1-7; 51a), first relying on a local rule and then upholding same against Petitioner's

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be cast on state supreme court management of the essentially regulatory function of licensing attorneys and disciplining attorneys and judges." Barry Friedman & Jas. E. Gaylord, *Rooker-Feldman, From the Ground Up*, 74 NOTRE DAME L. REV. 1129, 1132 (1999).

[7] N.D.GA LR 83.1(A): "Continued membership in this court's bar is contingent on the attorney's maintaining active status in good standing with the State Bar of Georgia." Arguably, the rule provides an independent basis for Petitioner's disbarment, but in light of *Selling* and the first opinion of the court of appeals (60a), discussed *infra*, no court has taken that position, including the Eleventh Circuit following remand. Prior to the first opinion of the court of appeals Petitioner had contended that the rule violated principles of right and justice under *Frazier v. Heebe*, 482 U.S. 641 (1987), and Fifth Amendment Due Process.

attack *inter alia* under *Frazier v. Heebe*, 482 U.S. 641 (1987):

> "Continued membership in this court's bar is contingent on the attorney's maintaining active status in good standing with the State Bar of Georgia." (52a).

Then O'Kelley, J. announced that he would not refer the matter to the court's disciplinary committee that "arguably" had jurisdiction, stating that,

> "[I]t is clear that under the local rules one who is disbarred by the State Bar of Georgia, who by definition is not an active status member in good standing, is subject to disbarment from the bar of the Northern District of Georgia, as well. Local Rule 110-6(a) implements this rule. The Supreme Court of Georgia ruling qualifies as a per se verification of professional misconduct, thereby eliminating the need for a committee investigation. This conclusion is premised on the fact that the committee's purpose is to conduct an investigation with the goal of ascertaining the existence, or lack thereof, of professional misconduct." (52a).

On appeal the Court of Appeals (Goldbold, Roney, Hatchett, JJ.) held on January 7, 1998 (60a):

> "The district court abused its discretion in disbarring appellant Winford Bishop based on its finding that the Georgia Supreme Court's disbarment of Bishop 'qualifie[d] as a per se verification of professional misconduct.' We vacate

and remand with instructions that the court conduct an analysis of this case pursuant to the factors set forth in *Selling v. Radford*, 243 U.S. 46 (1917).*

VACATED AND REMANDED

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* Because of our disposition of this case, we decline to address Bishop's remaining issues." [8]

On remand, **Vining, C.D.J.** signed this order on January 5, 1999 (44a):

"In *Selling v. Radford* the U.S. Supreme Court held that a federal court may rely upon a state court disbarment to disbar an attorney from practicing before it

> 'unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2, that there was such an infirmity of proof as to facts **found to have established the want of fair private and professional character** as to give rise to a clear conviction on [the court's] part that [it] could not consistently with [its] duty accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince [the court] that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon [the court] not to disbar except upon the conviction that, under the

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[8] Court denied Petitioner's fee motion "without prejudice" (62a).

principles of right and justice, [the court] were constrained to do so.'

In disbarring Bishop, the Georgia Supreme Court did not make any factual findings regarding Bishop's character but, instead, relied upon the fact that he never responded to the notices of disciplinary action that had been mailed to him. Therefore, this court concludes that it cannot rely upon the state disbarment order to disbar Bishop from practicing in this court. Consequently, the court will not disbar Bishop based upon his disbarment by the Georgia Supreme Court. Because of this determination, all other pending motions in this action are rendered moot. **However, because Bishop has been disbarred by the Georgia Supreme Court and by the Court of Appeals for the Eleventh Circuit, the court concludes that Bishop's professional character has been called into question. Therefore, the court requests that the Chief Judge of this court** refer Winford Kent Bishop **to the court's Committee on Discipline ... so that the Committee can investigate the charges of misconduct** made against Bishop and make a written report to this court as to the proper action to take." (emphasis added)[9]

Tidwell, C.J. asked Vining, J. on January 28, 1999 "to furnish me a written specification of the charges so that I might forward the specifications to our Disciplinary Committee." (47a), but Vining, J. declined and replied on February 2, 1999, that "our disciplinary committee would be charged with investigating those two

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[9] Judge Vining's order was confirmed by the court on September 28, 1999, in the course of dismissing an interlocutory appeal (63a).

complaints." (48a). Tidwell, J. enclosed Vining, J.'s letter in referring the grievances for investigation to N.P. Chilivis, chair of committee, on February 11, 1999 (R5-4), and entered an order under seal on May 18, 1999 that Petitioner could not appear before the court on behalf of a client (R5-7).

In August 1999, the district court appointed a new committee (SR-2, 3) that consumed two years completing a proposed report served July 3, 2001 (38a). Although acknowledging Judge Vining's order, the Attridge committee reversed direction, made a second *Selling* analysis, refused to investigate the grievances, and recommended that the Georgia disbarment be recognized. In essence, then, the committee found that because Petitioner was in a situation where a default could be entered against him, this was sufficient evidence of a "want of private or professional character" to merit disbarment.

Petitioner responded with motion to vacate the proposed report (R5-11), motion to accord persuasive effect to his victory in state fee arbitration (R6-19), and affidavits and briefs to repel the grievances (R5-15, 16) and disaffirm receipt of due process (R5-12, 13, 14, 15). He requested an evidentiary hearing on conduct (SR-7, 8), but the committee denied this request (SR-9, 10). Three days before hearing, the committee stated that he could present two hours of testimony on any issue but the grievances and arbitration (SR-10).

At the August 24, 2001 committee hearing, Petitioner produced character witnesses: C.B. Rogers, J.D., senior partner, Rogers & Hardin, Atlanta, for whom Petitioner performs legal work as an independent contractor (T01 8, 10 (15)); George W.K. Snyder, J.D., classmate (Class of 1966) at Harvard Law School (*id.*, 17, 21 (13)); Vance

O. Rankin, III, J.D., local attorney who went to high school with both Petitioner, the 1971 client, and the client's brother (*id.* 17, 21 (13); and testimony on mitigation (T01 37 (1)).

On October 12, 2001, the committee issued its final report stating, "it was the District Court's intention and direction to have this Committee conduct [a second] *Selling* analysis, which it has done." (40a). As for *Selling* factor one (procedural due process): "It is recognized that reasonable persons might disagree whether the matter should have been opened; however, as a matter of law, [Petitioner] received due process." (35a). As for *Selling* factor two (infirmity of proof of misconduct), the committee considered only whether the Georgia bar had served him with process, which was the very same issue resolved against Petitioner under factor one (36a). "[The committee] made no attempt to weigh the merits of these underlying grievances" (41a). As for *Selling* factor three (grave reason not to disbar under principles of right and justice), the committee limited itself to the "unique" circumstances in *Theard v. United States*, 354 U.S. 278 (1957) (36a). Concluding, the committee said: "It stands to reason that if there was some injustice or wrong visited upon [Petitioner] in the State proceedings, it would have been picked up by one of the three other courts [*i.e.*, Fifth, Eleventh Circuits or Supreme Court]." (38a). Petitioner asked Evans, J. to permit response to the final report (R7-31). She refused stating that it was "no[t] appropriate at this time" (*ibid*).

Evans, J. affirmed the final report on February 26, 2002, without reviewing the merit of the state grievances, finding that the committee's merger of *Selling* factors one and two was correct. The judge

directed the immediate transmission of the report under seal to the court of appeals depriving Petitioner of reconsideration or motion under Rules 52 and 59, Fed.R.Civ.P. Evans, J.'s order refers to the Eleventh Circuit's mandate, as follows (6a):

> "**It clearly was not the intent of the Court of Appeals** that this Court conduct a de novo determination of the merits of the complaints of Respondent's clients which initiated the State Bar proceeding. While **this Court's [Vining, J.'s] January 5, 1999 order is not totally clear in that regard**, the Committee interpreted it correctly and Respondent has had a full and fair opportunity to respond and rebut the Committee's Report." (emphasis added)

The court of appeals affirmed on October 2, 2002, by mischaracterizing *Selling* factor two to be "proof in the state proceeding was insufficient" (2a), rather than proof of misconduct was insufficient, and relying on *In re Calvo*, 88 F.3d 962 (11th Cir. 1996), a dissimilar, reciprocal attorney disciplinary decision (because the Florida state and federal courts had found that Calvo had committed misconduct and was unfit to practice).

REASONS FOR GRANTING THE WRIT

This Court should grant *certiorari* to clarify whether *Selling* should be applied in the non-misconduct context; and if *Selling* should be applied, this Court should clarify the proper method for analyzing *Selling* factors two and three. The analysis commences on the assumption that *Selling* applies. Whether *Selling* applies is treated in Part IV. The most substantial conflict, one touching this Court, is discussed in Part V.

I.
OPINIONS BELOW CONFLICT WITH CASES THAT *SELLING* FACTOR 2 REQUIRES DECISION ON CONDUCT PRIOR TO DISBARMENT

To recap, Judge Vining held (46a) that where there is no state finding on a lawyer's character, a federal court may not disbar the lawyer based on the state disbarment. To Judge Evans (6a), the only requirement is that the state must have afforded procedural due process to the lawyer. If constitutionally-sufficient notice were given to the lawyer in state court and he did not respond – even for lack of actual knowledge -- he may be disbarred from federal court even without adjudication of misconduct. The court of appeals (2a) adopted Judge Evans' interpretation of *Selling*. Thus these courts conflated *Selling* factor two (proof of misconduct) with factor one (procedural due process). **The result was a new factor two, whether "proof in the state proceeding was insufficient."**

However, there could have been another response by Judge Evans. She could have inquired whether there was sufficient proof that Petitioner ignored the notices (as opposed to not seeing them) and, if so, whether a finding that Petitioner ignored them purposefully is sufficient proof of unfit character. Also, Judge Evans could have considered whether a federal court should conduct, if not a *de novo* hearing on a respondent lawyer's conduct, a review of the record for substantial evidence of lack of proper conduct. Thus, considering *Selling* to be applicable, the Supreme Court's guidance is needed about how to apply *Selling* in the default context.

If the Court should find that *Selling* is applicable, then the question is whether *Selling* factor two was

properly understood and applied. *Selling* defined factor two as disallowing a federal disbarment upon a state disbarment if the state disbarment is based on –

> "such an infirmity of proof as to the facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not, consistently with our duty, accept as final the conclusion on that subject" (243 U.S. at 51).

In *dictum* (243 U.S. at 49), *Selling* is plain that a state disbarment due to a lawyer's mere relocation out of state (change of domicil), if so provided by state law, is insufficient for federal disbarment. But elsewhere in the opinion, *Selling* assumes that the predicate state disbarment occurred because of a finding of misconduct.[10] Without the *dictum*, *Selling* would authorize federal disbarment if (a) a lawyer should contest a state disbarment following a relocation, (b) the state court had accorded to him procedural due process, (c) there was no infirmity of proof that he had relocated out of state, and (d) there is no grave reason (read below to require a "unique" reason) why he should not be disbarred. In this sense *Selling* is ambiguous and *certiorari* should be granted to clarify *Selling* factor two.

Where there has been a state default disbarment, a sequential federal disbarment based on this default would be inconsistent with several prominent decisions of this Court, to wit: *See, e.g., Ex parte*

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[10] And in fact, the Michigan supreme court found that Radford committed professional misconduct in connection with administering an estate. *In re Radford*, 134 N.W. 472 (Mich. 1912).

Garland, 71 U.S. (4 Wall.) 333, 378-79 (1867) ("The order of admission [to the Supreme Court bar] is the judgment of the court that the parties possess the requisite qualifications as attorneys and counselors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. **They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court** after opportunity to be heard has been afforded" (p. 378)) ("The attorney and counselor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can **only be deprived by the judgment of the court, for moral or professional delinquency**") (p. 379)).

Selling v. Radford, 243 U.S. at 49, 51 (*dicta*) ("[A]lthough the membership of the Bar of the court of last resort of a State after admission here might be lost by change of domicil from one State to another, if so provided by the state law or rule of court, or **by any other cause not involving unworthiness, such loss would be wholly negligible upon the right to continue to be member of the Bar of this court.**") (p. 49)) ("[Regarding *Ex parte Tillinghast*, 29 U.S. (4 Pet.) 108 (1830), A] mere punishment for contempt by an inferior federal court was not a sufficient ground for preventing admission to the Bar of this court, there being nothing to indicate that the action of the inferior

court was based upon the doing of acts which inherently and necessarily deprived the applicant of the fair private and professional character essential to admission."(p. 51)). *In re Ruffalo*, 390 U.S. 544, 555 (1968) (White & Marshall, JJ., concurring) (Sixth Circuit may not discipline attorney except for "conduct which **all** responsible attorneys would recognize as improper for a member of the profession"). *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991) (Rehnquist, C.J.) ("[a lawyer cannot] invoke the constitutional right of free speech to immunize himself from even-handed discipline for **proven** unethical conduct.").

There are also several appellate decisions requiring proof of misconduct in the state proceedings. The most prominent is *In re Palmisano*, 70 F.3d 483, 487 (7th Cir. 1995) (Easterbrook, J.), in which the court observed in *dicta*:

> "But state and federal tribunals may use different substantive criteria for membership in their bars. For example, a state may decide that the representative plaintiff in a class action must agree to bear the costs if the class loses, and may discipline attorneys who relieve their clients of the burden; but in federal court the attorney may pick up the costs in order to facilitate the device established by Fed.R.Civ.P. 23. *See Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991). Thus discipline in a state court of an attorney who paid the costs in a class action would not lead to a penalty in federal court; different standards of appropriate conduct lead to different responses. See generally *Theard, supra.*"

To apply this principle to Petitioner's case, suppose that he had represented the lead plaintiff in a federal class action, had not required that plaintiff to be responsible for costs if the class action were lost, but in fact, had paid those costs. Suppose further that Petitioner had been charged with an ethical violation by the Georgia bar for these actions but had not responded to mailed, but not received, notice of the disciplinary charges, and had been disbarred by the Georgia court. Would a federal court in the Seventh Circuit apply *Selling* in the first instance? The answer would be, yes. A second question would be, would the Seventh Circuit disbar him? The answer would be, No. This hypothetical solves Petitioner's case. The district court has no interest in whether Petitioner replies to the Georgia bar's notices of disciplinary action. Such unintentional inaction is not intrinsically "bad" and does not indicate unfitness to practice law. Thus, Petitioner should be no more disciplined that Palmisano would have been in the Seventh Circuit's hypothetical.

See also the following appellate decisions: *In re Kramer*, 193 F.3d 1131 (9th Cir. 1999) (district court violated due process in disbarring lawyer based on New York disbarment without performing a *Selling* analysis), 282 F.3d 721 (9th Cir. 2002) (district court satisfied *Selling* in disbarring attorney who had been reprimanded 38 times for misconduct); *In re Thies*, 662 F.2d 771 (D.C. Cir. 1980) (Tax Court disbarment entered automatically upon attorney's New York disbarment - itself based on an out-of-state felony

conviction -- violated due process rights of attorney; and case was remanded).[11]

A final issue is suggested by the following statement in *In re Smith*, 100 F.Supp.2d 412, 416 n.12 (N.D.Texas 2000): "When a federal disbarment is predicated on a state disbarment that meets the due process criteria outlined in *Selling*, a *de novo* evidentiary hearing is not a prerequisite." The suggested issue is whether a state disbarment that is entered upon a state record not containing a finding of misconduct or unfitness requires a *de novo* evidentiary hearing in any federal court that seeks to disbar a member of its bar on the basis of the state disbarment. Granting the writ would afford an opportunity to answer this question.

II.
OPINIONS BELOW CONFLICT WITH DECISIONS THAT *SELLING* FACTOR THREE DOES NOT REQUIRE UNIQUENESS

Selling factor three is phrased thus:

> "[T]hat some other grave reason existed which should convince [the court] that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon [the court] not to disbar except upon the conviction that, under the principles of right and justice, [the court] were constrained to do so."

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[11] Regarding denial of bar admission ("the other side of the coin" from disbarment (*In re Evans*, 524 F.2d 1004, 1007 (5th Cir. 1975)), *see, e.g., Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) (the power of courts to disbar or otherwise discipline attorneys must be exercised consistent with the requirements of the Due Process and Equal Protection Clauses); *Konigsberg v. State Bar of Calif.*, 353 U.S. 252 (1957).

In concurring in *In re Ruffalo*, 390 U.S. 544, 552 (1968), Justice Harlan suggests the following:

> "I see no need to decide whether the notice given petitioner of the charge that formed the basis of his subsequent federal disbarment [a 13th charge was added after Ruffalo and his railroad investigator Orlando had testified at the former's state disciplinary hearing] was adequate to afford him constitutional due process in the state proceedings. For I think that *Theard v. United States*, 354 U.S. 278, leaves us free to hold, as I would, that such notice should not be accepted as adequate for the purposes of disbarment from a federal court. On that basis, I concur in the judgment of the Court."

Thus, Justice Harlan would find that the state procedural irregularity constituted a grave reason under *Theard* not to disbar Ruffalo. Similarly, where a federal court declines to go behind the Georgia court's completely unfounded and clearly erroneous statement (that "[h]e failed to inform the State Bar of his new address") notwithstanding the state bar's disciplinary board's conclusive finding (that Petitioner "made a reasonable effort to notify the State Bar of his change of address ... and [he] thought the State Bar had his new address" (Final Report, ex. 6)), the court should find that such a factual record reflects a procedural deficiency that constitutes a grave reason not to disbar him. But the courts below refused to address this contention despite Petitioner's request at the hearing (T01 53 (2)). *Cf. In re Gouiran*, 58 F.3d 54, 58 (2nd Cir. 1995) ("because the district court's order here gives us no indication that it considered the exceptional

circumstances of this case, meaningful appellate review is not possible.").

But there are other reasons: The state court violated venerable principles of right and justice, such as (a) do not harm an innocent person and (b) make the punishment fit the crime. The principle of not harming innocent persons has a basis in decisions of this Court. *See, e.g., Schlup v. Delo,* U.S. 1995) (upon showing of actual innocence by a preponderance of the evidence, a procedurally defaulted *habeas* prisoner may be heard on his claim of a denial of constitutional right that was defaulted); *United States v. Holmes,* 26 Fed.Cas. 360 (C.C. E.D.Pa. 1842) (cannibalism in face of starvation is not justified); Chas. Fried, *Right and Wrong* 7 (Harv. 1978).

The principle of making the punishment fit the crime is also well settled. *See* punitive damage cases such as *State Farm Mut. Ins. Co. v. Campbell,* 538 U.S. __ (2003); *BMW of N. Amer. v. Gore,* 517 U.S. 559 (1996). Here, all reasonable attorneys would agree that inadvertence is not deserving of economic "capital" punishment – which is disbarment.

The committee erred in limiting the definition of "grave reason not to disbar" to insanity occurring years ago, as found in the only case cited, *Theard v. United States,* 354 U.S. 278 (1957). The District Court's failure to go beyond the committee's single citation may be attributed to (a) *dictum* in *In re Calvo,* 88 F.3d at 967, strictly limiting *Selling* factor one to "procedural" due process and (b) not fully recognizing that *Selling* factors two and three are both based on principles of right and justice that inform due process of law.

III.
OPINIONS BELOW CONFLICT WITH PRESUMPTION OF INNOCENCE BY SHIFTING BURDEN

Attorney disciplinary cases "are adversary proceedings of a quasi-criminal nature," *In re Ruffalo*, 390 U.S. 544, 551 (1968), and "lawyers also enjoy first-class citizenship," *Spevack v. Klein*, 385 U.S. 511, 516 (1967). Therefore, attorneys should enjoy a presumption of innocence with the burden of proof of bad conduct placed on the prosecutor. Yet, this Court in *In re Isserman*, 345 U.S. 286, 289 (1953), stated that, "Our rule puts the burden upon respondent to show good cause why he should not be disbarred." However, Isserman had already been adjudicated guilty of misconduct by a federal court and disbarred in state court.[12] Dissenting in *Konigsberg v. State Bar of Calif.*, 353 U.S. at 277, Justice Harlan stated that "the [state bar] applicant has the **burden of proof** in showing that these requirements [of good character for admission] have been met." (emphasis added).

Below, the Eleventh Circuit stated:

> "*Calvo* [88 F.3d 962] instructs that '[t]he burden is on the disbarred attorney to show good cause why he should not be disbarred, and the district court is not required "to conduct a *de novo* trial in the first instance of [the attorney's] fitness to practice law."' *[sic] Id.* (quotation and citation omitted)." (2a).

But Calvo had been found guilty of several acts of misconduct and the district court had found him unfit

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[12] Supreme Court disbarment was later vacated, 348 U.S. 1 (1954).

to practice law. *Calvo*, 88 F.3d at 968. [13] By contrast, Petitioner has never been adjudged guilty of misconduct by any court, nor found unfit. *Certiorari* would provide an opportunity for clarification.

Shifting the burden of proof deprives an attorney of the defenses that (a) the state court failed to prove that the lawyer had perpetrated any act of misconduct and (b) the prosecutor failed to satisfy her burden of proof that the attorney lacks good character. To shift the burden and to deny use of probative defenses, the court of appeals violated Fifth Amendment Due Process.[14] Moreover, shifting the burden of proof as permitted in *Isserman, supra*, suggests that *Selling* is not applicable. *See* Part IV, below.

IV.
OPINIONS BELOW CONFLICT WITH OTHER FEDERAL COURTS THAT DISREGARD "NON-MISCONDUCT" STATE BAR ACTION

So far Petitioner has assumed that *Selling* applies to non-misconduct state disbarment. Now Petitioner cites to several recent cases that permit the suggestion that

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[13] *Calvo* dispensed with a requirement that the state bar have followed well-recognized rules of evidence, and even permitted the Florida federal court to dispense with the Federal Rules of Evidence. 88 F.3d at 967. *Contra:* Rule 1101.

[14] On whom the burden of proof is placed is also constitutionally significant under Fourteenth Amendment Due Process. *Santosky v. Kramer*, 455 U.S. 745 (1982) (in case to terminate parental rights, risk of incorrect decision is so great as to require state to prove unfitness by clear and convincing evidence, and its use of preponderance of evidence standard is too risk-prone); *In re Winship*, 397 U.S. 358 (1970) (in juvenile delinquency proceeding, state must prove guilt beyond a reasonable doubt and not merely by clear and convincing evidence).

Selling does not apply. However, if *Selling* applies, the following cases support *Selling* factor three.

A. *Smith.* In *In re Smith,* 100 F.Supp.2d 412 n.1 (N.D.Texas 2000), the court quoted a local rule that excludes from federal attorney disciplinary proceedings the following classes of state discipline: **"nonpayment of dues, failure to meet continuing legal education requirements, or voluntary resignation unrelated to a disciplinary proceeding or problem."** Petitioner suggests that his not responding to notices of disciplinary action of which he lacked actual knowledge is no more deserving of condemnation than the exempted categories in this local rule.

B. *Desilets.* In *In re Desilets,* 291 F.3d 925 (6th Cir. 2002), a creditor in a Chapter 13 bankruptcy case moved that the debtor's attorney Rittenhouse be disbarred and ordered to pay a fine and disgorge fees for acting as an "attorney" in the bankruptcy court for the Western District of Michigan. The bankruptcy court (247 B.R. 660) permitted the Michigan bar to participate as *amicus curiae.* The facts are that Rittenhouse was admitted to the Texas bar in 1992, moved to Wisconsin in December 1992, and **tried unsuccessfully to gain admission to the bars of Wisconsin and Michigan.** (The opinions do not state why he was not admitted.) In 1994, he was properly admitted to the bar of the District Court for the Western District of Michigan. He established an office in Michigan and limited his practice to federal bankruptcy law. In 1999, the State Bar of Michigan **sued him to enjoin him from the unauthorized practice of law.** In April 2000, the chief bankruptcy judge imposed fines and ordered him to disgorge fees.

In August 2000, the *en banc* bankruptcy court suspended the attorney indefinitely from practice in that court. The district court affirmed. Also in August 2000, **Rittenhouse entered into a stipulated injunction with the Michigan bar that he would not engage in the unauthorized practice of law**. On appeal the Sixth Circuit cited to *Theard* and *Ruffalo*, which are based on *Selling*, but **did not apply the latter's three-prong due-process analysis to the state injunction against Rittenhouse**. The Sixth Circuit held that the local rules for the Western District of Michigan permitted Rittenhouse to practice law in counseling his bankruptcy clients in his Michigan office and was not limited to merely representing them in federal court.[15]

C. *Poole*. In *In re Poole*, 222 F.3d 614 (9th Cir. 2000), a trustee in bankruptcy had moved to disallow a fee to attorney Smith for representing Poole in a bankruptcy petition. The bankruptcy court denied the motion, and the bankruptcy appellate panel affirmed. The facts are that attorney Smith was first admitted to the Illinois bar, and in 1991, he was admitted to the bar of the District Court for the District of Arizona. He is not a member of the Arizona state bar, but on the bankruptcy petition he listed an office in Scottswood, Arizona. After citing *Theard*, *Ruffalo*, and *Selling*, the Ninth Circuit observed that "suspension from federal practice is not dictated by state rules. *** The State of Arizona is not a party to this case. It has not imposed any discipline upon Smith, nor has it charged him with unauthorized practice of law. In short, this case is not

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[15] The court rejected an alleged distinction between the practice of law (which requires a license from the state in which same occurs) and the practice of law in a federal court (which, although it requires a license, is "merely" a specialized forum).

about any federal effort to displace state discipline; it is about the inappropriate reliance on state authority to impose federal discipline."

In Petitioner's case, the Georgia bar is not a party (although Petitioner so moved (R1-8)). While the Georgia court imposed discipline upon Petitioner, it was not for misconduct, as Judge Vining held (46a). Therefore, Petitioner's case is no more "about any federal effort to displace state discipline" than is *Poole*. "[I]t is about the inappropriate reliance on state authority to impose federal discipline."

D. Inherent Power. The district court's jurisdiction over Petitioner's license to practice law in said court is rooted in its "inherent power." In *In re Snyder*, 472 U.S. 634, 643, n.4 & n.6 (1985) (six-month suspension of lawyer from bars of Eighth Circuit was not justified by his rudeness to Circuit's chief judge out of the court's presence), this Court did not employ the *Selling* analysis to the Eighth Circuit's suspension order, but examined the question whether Snyder's conduct constituted misconduct or conduct unbecoming a member of the Eighth Circuit bar. The Court avoided constitutional issues and found that Snyder had not committed misconduct. *See also Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) (court may employ inherent power to punish attorney for bad faith conduct not fully covered by federal statutes and principles); *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980) (bad faith conduct by attorneys permits adverse award under federal statute).

V.

CONFLICT ON *SAME* CASE AMONG 4 COURTS OF APPEALS, 3 DISTRICT COURTS, 2 STATES & SUPREME COURT SUGGESTS GRANT OF WRIT

After entry of the first state disbarment, the Georgia court and bar notified the district court and Court of Appeals for the Fifth Circuit.[16] After entry of the second state disbarment, the Georgia court (24a) and bar advised these courts and the Eleventh Circuit.[17] The Georgia bar also informed the New York Appellate Division, First Department,[18] which reviewed the Georgia order and determined not to take action against Petitioner's New York license to practice law.[19] Petitioner advised the Supreme Court;[20] and upon finality of the second state disbarment, sent a copy of the Georgia order to the clerks of the other courts to which admitted; and none of these courts took action against Petitioner's licenses to practice law.[21]

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[16] Petitioner received without forewarning in 1993, a District Court disbarment order (R1-1) and a Fifth Circuit show cause order. The District Court order was vacated (24a) and the Fifth Circuit discontinued proceedings.

[17] Petitioner received in 1994, show cause orders from the district court (55a), Fifth Circuit (22a), and Eleventh Circuits (23a).

[18] The Georgia bar's general counsel advised Petitioner on January 20, 1993, that his office would notify all courts of a disbarment in which a disbarred Georgia lawyer was known to be admitted. Petitioner had notified the Georgia bar of all of his bar memberships upon applying to take the Georgia bar in 1971. The general counsel advised that all Georgia disbarments are entered in the National Discipline Data Bank maintained by the American Bar Association and all bars regularly review same.

[19] Based on telephone conversation with a deputy clerk of the New York Appellate Division, First Department in 1995.

[20] Aug. 11, 1994 (Case No. 94-459); Dec. 15, 1994 (Case No. 94-7362).

[21] Evidence of bar memberships is found at R5-14-2. One reason for lack of action by SecondCircuit might have been its conclusion that Georgia did not comply with spirit behind 2nd Circuit Rule 46(f)(1) requiring "reasonable effort ... to locate the attorney's current address" before service of bar notices is effective.

On the other hand, the Court of Appeals for the Eleventh Circuit disbarred on Jan. 5, 1995 (23a), after first denying by order of even date (JN-1; R7-36) Petitioner's December 2, 1994 motion to supplement the record with after-acquired evidence (R1-9), and then ruling through the clerk that same was an administrative proceeding, not a "case" or "controversy,"[22] in the course of rejecting his petition for rehearing (JN-2).[23] The Fifth Circuit disbarred in a single-judge order on July 14, 1994 (22a) prior to development of facts about the Georgia disbarment. [24]

This state of affairs may reflect adversely on some of these courts. *Certiorari* would permit explication that would be of benefit to them and to the American bar, *cf. In re Capshaw*, 65 S.Ct. 673 (1945) (show cause order entered and committee appointed), 67 S.Ct. 1345 (1947) (disbarment ordered). *Certiorari* would clear his name.

CONCLUSION

To clarify *Selling* in the non-misconduct and default contexts, the petition for *certiorari* should be granted.

Respectfully submitted,

April 28, 2003 James E. Spence, Jr.

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[22] An attorney disciplinary case being a "case" or "controversy" under Art. III, and not an administrative proceeding, the Eleventh Circuit denied Due Process in disbarring Petitioner on January 5, 1995. The January 7, 1998 panel accorded no deference to the earlier Eleventh Circuit disbarment, suggesting it is a nullity.

[23] *But cf. Greer's Refuse Serv., Inc. v. Browning-Ferris Indus.*, 843 F.2d 443 (11th Cir. 1988), in which a petition for rehearing was decided.

[24] Congress ordained the appeals courts to sit in panels of three judges. 28 U.S.C.A. 46(c). *See Western Pac. R. Corp. v. Western Pac. R.Co.*, 345 U.S. 247, 254, 256, 258 (1953). Thus, a single-judge, Fifth Circuit disbarment is void.

Filed October 2, 2002
[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12061
Non-Argument Calendar

D.C. Docket Nos. 99-00001-AD & 058900 STATE BA
[sic]

IN THE MATTER OF:

WINFORD KENT BISHOP

Appellant.

Appeal from the United States District Court for the
Northern District of Georgia

(October 2, 2002)

Before ANDERSON, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

Winford Kent Bishop, an attorney proceeding pro se, appeals his disbarment from practice in the U.S. District Court for the Norther *[sic]* District of Georgia. In disbarring Bishop, the district court relied upon the

Georgia Supreme Court's disbarment of him. In doing so, the court found that the Georgia disbarment proceeding had none of the infirmities identified in Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377 (1917). In Selling, the Supreme Court held that a state court disbarment should be accorded federal effect, unless it appears from an "intrinsic consideration" of the state record that: (1) the state proceeding lacked due process; (2) the proof in the state proceeding was insufficient; or (3) grave injustice would result in the imposition of such discipline. In re Calvo, 88 F.3d 962, 966-67 (11th Cir. 1996) (citing Selling, 243 U.S. at 50-51).

We review a district court's disbarment order for abuse of discretion. Calvo, 88 F.3d at 967. Calvo instructs that "[t]he burden is on the disbarred attorney to show good cause why he should not be disbarred, and the district court is not required 'to conduct a de novo trial in the first instance of [the attorney's] fitness to practice law." *[sic]* Id. (quotation and citation omitted). "Instead, it [the district court] must determine whether the record underlying the predicate state disbarment ... reveal[s] the kind of infirmities identified in Selling." Id. Bishop has not demonstrated that reciprocal disbarment by the district court is inappropriate under any of the infirmities identified in Selling.

We find no abuse of discretion.

AFFIRMED.

Filed: Feb. 26, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: WINFORD KENT BISHOP

: DISCIPLINARY
: ACTION
: D.C. No. 058900
: C.A. No. 96-8136

ORDER

This disciplinary matter is before the Court on order of remand from the United States Court of Appeals for the Eleventh Circuit.

Briefly, the history of this matter is as follows. Respondent, an attorney, was disbarred by the Supreme Court of Georgia in 1993. This disbarment followed his failure to respond to notices from the State Bar requiring that he respond in writing to certain complaints made by clients. Respondent contended then, as now, that the disbarment was unfair because he did not receive actual notice of the papers directing a response.

An order disbarring Respondent from this Court's bar followed on October 12, 1994. This order of disbarment stated it was based on the fact of the State Bar disbarment, in that the rules of this Court require that members of its bar be members in good standing of the State Bar of Georgia. Respondent appealed to the United States Court of Appeals for the Eleventh

Circuit. On January 7, 1998, a panel of the Court of Appeals vacated this Court's order and remanded with instructions that this Court analyze [page 2] Respondent's case pursuant to the factors set forth in Selling v. Radford, 243 U.S. 46 (1917).

This Court by order of January 5, 1999 referred Respondent's case to the Disciplinary Committee for the Northern District of Georgia "so that the Committee can investigate the charges of misconduct made against Bishop and make a written report to this Court as to the proper action to take." Order, p. 3. On April 7, 1999, the Disciplinary Committee notified Respondent and invited his response. Thereafter, an investigation ensued. The extensive nature of the investigation is set forth in the Committee's report to this Court dated October 11 *[sic]*, 2001, which has been filed under seal. The Committee has examined the pleadings and briefs submitted in the underlying state disbarment proceedings, and has examined the procedures utilized by the State Bar and the Supreme Court of Georgia in the handling of the state disbarment proceedings. Also, the Disciplinary Committee has set out in its October 12, 2001, report its analysis of this case under Selling and In re: Calvo, 88 F.3d 962 (11th Cir. 1996). After applying the standards set out in the Selling and Calvo cases, the Disciplinary Committee has made findings, which are summarized on page 29 of its report. Specifically, the Committee has found the following:

(1) The record of the State Court proceedings reveals no infirmities in the state's notice procedures on their face of *[sic]* as applied; and [page 3]

(2) The record of the State Court proceedings reveals no infirmity of proof in the state proceedings; and

(3) The record of the State Court proceedings reveals no unique factors which would cause manifest injustice to Respondent under the circumstances of this case.

After a thorough and independent review of the "record underlying the predicate state disbarment," the Committee finds that this record does not reveal "the kind of infirmities identified in Selling." Calvo at 967.

Report at p. 29

The Court notes that the Committee's report was submitted to Respondent as a Proposed Report on July 2, 2001. Respondent objected to the Proposed Report and an evidentiary hearing was held on August 24, 2001, before the Disciplinary Committee. Respondent was represented by counsel. The proceedings were reported and a transcript of the hearing has been filed with this Court.

At the hearing, Respondent presented the testimony of character witnesses: C.B. Rogers, George Snyder, and Vance O. Rankin, II. He testified himself and argued that the role of the Committee was not to determine whether he had received due process in the state disbarment proceedings, but rather to conduct a de novo investigation of the merits of the complaints filed by clients of Respondent in 1991 which initiated the State Bar disbarment proceedings. Respondent filed numerous briefs and [page 4] papers addressing this issue. Basically, Respondent argued that it was not the intent of the United States Court of Appeals for the

Eleventh Circuit or of this Court that the review of the State Bar proceedings be limited to matters of due process, plus any evidence Respondent might wish to offer to rebut the findings of the Georgia Supreme Court.

It clearly was not the intent of the Court of Appeals that this Court conduct a de novo determination of the merits of the complaints of Respondent's clients which initiated the State Bar proceedings. While this Court's January 5, 1999 order is not totally clear in that regard, the Committee interpreted it correctly and Respondent has had a full and fair opportunity to respond and rebut the Committee's Report.

As is noted by the Committee in its report, in Selling the Court held that the state court's disbarment should be recognized and given its full effect unless "from intrinsic consideration of the state record", one or all of the due process conditions set out below are met. Id. At 51. Also, Calvo stated that "the burden is on the disbarred attorney to show good cause why he should not be disbarred." Id. At *[sic]* 967. The Committee found that the State Bar disbarment proceeding complied with due process and that, given the evidence the Committee heard that there was no reason not to adopt the determination of the Supreme Court of Georgia regarding Respondent's disbarment. After a review of the extensive record in this case, the Court has determined that the [page 5] Committee is correct. Accordingly, this Court again affirms its Order of disbarment as to the Respondent, W. Kent Bishop.

The foregoing action was approved, authorized and adopted by the judges of this Court, with one

judge abstaining, at the District Judges' meeting of January 10, 2002.

The Clerk is directed to transmit a copy of this order, together with a sealed copy of the report of the Disciplinary Committee dated October 12, 2001, to the United States Court of Appeals in response to its order of remand of January 7, 1998. Additionally, the Clerk is directed to transmit a copy of this order to the Respondent, W. Kent Bishop, and his counsel.

SO ORDERED, this 26 day of February, 2002.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

REPORT OF THE DISCIPLINARY COMMITTEE FOR THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA

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CONFIDENTIAL

TO: Honorable Orinda Evans, Chief Judge,
U.S. District Court, Northern District of Georgia
FROM: Committee on Discipline for the United States District Court, N.D. of Georgia
RE: Matter of W. Kent Bishop

NORTHERN DISTRICT DISCIPLINARY COMMITTEE
RE: W. KENT BISHOP

Pursuant to the direction of this Honorable Court and the Rules Governing the Committee on Discipline for the United States District Court, N.D. of Ga. (App. "G"), the Committee files with this Court its Report of Investigation containing findings of fact, conclusions of law and the Committee's recommendation and shows the Court:

I. STATEMENT OF THE CASE

A. Introduction

Respondent was disbarred by the Supreme Court of Georgia in 1993. Following the state court disbarment, this Court after issuing a show cause order to Respondent and receiving a response entered an Order of disbarment. Respondent appealed to the Eleventh Circuit which vacated the District Court's Order and remanded with specific directions.

The Supreme Court of Georgia disbarred Respondent as a result of his failure to respond to

complaints filed with the State Bar, relating to his handling of a child support modification case. The State Bar had notified Respondent of the complaints and investigation through the procedures provided for in the Disciplinary Rules of the State Bar. Throughout Respondent's lengthy litigation in various courts, it has been Respondent's position that he has not received [page 2] due process because notice provisions of the State Bar grievance procedures are flawed. Respondent does not appear to question that the State Bar followed the service procedures for notice of process, but contends that he never was personally served with the Notice of Investigation and Discipline from the Bar. Respondent contends that constructive notice provisions do not provide due process; that he must receive actual personal service. The specifics of the notice of service procedures of the State Bar and service of the notice on Respondent are extensively discussed in the transcript of the Special Master's hearing in the Georgia court. The specific interpretation of these state notice provisions as they relate to the Respondent are contained in the Georgia Supreme Court's *per curiam* decision of disbarment which is attached to this Report.

Following Respondent's disbarment in the Supreme Court of Georgia, Respondent was sequentially disbarred in the United States Fifth Circuit Court of Appeals, the United States Eleventh Circuit Court of Appeals and this Court. Respondent sought certiorari in the United States Supreme Court to the Supreme Court of Georgia and the Eleventh Circuit; certiorari was denied in both cases. Disbarment by this Court was reversed and remanded by the Eleventh

Circuit with direction which has resulted in this matter being referred to this Committee for investigation.

As will be shown below, the primary focus of the Committee's investigation is a review of the record underlying the predicate state disbarment. The Committee has also reviewed the proceedings in each of the other courts in which this matter has been considered.

The Committee's Report will set forth a full history of the proceedings relative to the disbarment of Respondent. Certain of the documents and important case authority are attached [page 3] to the Report as Exhibits. Other documents which were considered are contained in the Appendix submitted with the Report.

B. Referral to Committée

This matter comes to the Committee by referral from the Honorable Robert L. Vining, Jr., Senior United States District Judge (Order of January 5, 1999). The Court directed the Committee to investigate the matter, and "make a written report to this court as to the proper action to take." (Exhibit 1) The referral resulted from the Eleventh Circuit's vacating this Court's Order of October 12, 1994, disbarring the Respondent from practice in this Court and remanding with specific instructions. In In re Winford Kent Bishop, 96-8136 (11th Cir. 1998), the Circuit Court stated:

The district court abused its discretion in disbarring appellant Winford Bishop based on its finding that the Georgia Supreme Court's disbarment of Bishop 'qualifie[d] as a per se verification of professional misconduct.' We vacate and remand with instructions that the Court conduct an analysis of this case pursuant

to the factors set forth in Selling v. Radford, 243 U.S. 46 (1917).

Id. (emphasis supplied). (Exhibit 8).

Based on the specific language of the Eleventh Circuit's mandate, it appears that the Circuit Court disagreed with the District Court's legal basis for ordering the disbarment. In the District Court's Order of Disbarment, the court relied on the Local Rule [Section] 110 (since renumbered as 83.1), which states in part that "[c]ontinued membership in this court's bar is contingent on the attorney's maintaining active status in good standing with the State Bar of Georgia." L.R. 83.1, N.D.Ga. (emphasis supplied). The Court went on to state "[t]hus it is clear that under the local rules one who is disbarred by the State Bar of Georgia, who by definition is not an active status member in good standing, is subject to disbarment from the bar of the Northern District of Georgia as well." In re Winfred [sic] Kent Bishop, (N.D.Ga. 1994) (disbarment order) (Exhibit 7). [page 4] (emphasis supplied). On this reasoning, the Court stated, "[t]he Supreme Court of Georgia ruling qualifies as a per se verification of professional misconduct, thereby eliminating the need for a committee investigation." Id. It appears that this rationale was the basis of the Eleventh Circuit vacating and remanding this matter to the District Court "with instructions that the court conduct an analysis of this case pursuant to the factors set forth in Selling." In re Winford Kent Bishop, 96-8136, at 2.

C. Scope of Committee's Investigation - Standard of Review

With this direction from the Eleventh Circuit, the Committee has analyzed Selling and its progeny to guide the Committee in determining the proper scope

and substance of the investigation under the Selling principles. In Selling, the Court held that a federal court may rely upon a state court disbarment to disbar an attorney from practicing before it

> unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure for want of notice or opportunity to be heard was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on [the court's] part that [it] could not consistently with [its] duty accept as final the conclusion on that subject; or 3, that some other grave reason existed which would convince [the court] that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon [the court] not to disbar except upon the conviction that, under the principles of right and justice, [the court] were constrained to do so.
>
> Selling, 243 U.S. at 51 (emphasis supplied) (Exhibit 2).

The Committee found extremely instructive the recent Eleventh Circuit case of In re Calvo, 88 F.3d 962 (11th Cir. 1996). (Exhibit 3). This case originated in the Southern District of Florida and presented the Circuit Court with similar issues to the subject case. Calvo was decided shortly after the Eleventh Circuit had itself disbarred the Respondent herein from [page 5] practicing in the Eleventh Circuit based on the same

record that is presently before this Court in January 1995. Moreover, Calvo was helpful in understanding and applying the three Selling principles, and gave the Committee guidance regarding how to proceed in its investigation. In applying Selling, the Calvo Court noted that "disbarment by federal courts does not automatically flow from disbarment by state courts." Calvo, at 966 (quoting Theard v. United States, 354 U.S. 278, 77 S.Ct. 1271 (1957). By the same token, the opinion accords great deference to the state court's disbarment and places the burden on the disbarred attorney to show why he should not be disbarred in the federal court. Calvo expressly instructed:

> The burden is on the disbarred attorney to show good cause why he should not be disbarred, and the district court is not required to 'conduct a *de novo* trial in the first instance of [the attorney's] fitness to practice law.' Instead, it must determine whether 'the record underlying the predicate state disbarment ... reveal[s] the kind of infirmities identified in Selling.'

Id. at 967 (citing Greer's Refuse Serv., Inc. v. Browning-Ferris Indus., 843 F.2d 443 (11th Cir. 1988), cert. denied, 488 U.S. 967 (1988) (alterations in original).

Thus, consistent with Calvo's direction, the Committee's investigation does not entail undertaking a *de novo* review of the finding of fact and rulings of law in the State Court. Rather, the Committee is to give "'intrinsic consideration' to the state record." Id. at 966 (citing Selling, at 51). This is accomplished through an analysis set forth in Selling to determine if the state court proceeding suffered from any of the infirmities

identified in Selling that would not give the state disbarment its due weight. This is the standard of review undertaken by the Committee.

II. STATE BAR DISBARMENT PROCEEDINGS

A. Two Grievances Filed Against Respondent with the State Bar of Georgia (May 1991) [page 6]

On May 13, 1991 and May 23, 1991, two separate grievances were filed with the State Bar of Georgia against Respondent. (Appendix Attachment 1). The first grievance against Respondent was filed in May of 1991 by attorney Randy Joan Comins on behalf of a former client of the Respondent. The former client, Mr. Eugene Phillips, filed a separate grievance on his own behalf against Respondent in July of 1991.

B. Initiation of State Bar Grievance Proceedings - Notice of Investigation (January 1992)

On January 3, 1992, as a result of the filing of these grievances, the State Bar, following the procedures set forth in Ga.St.Bar 4-204.2 (1992), sent by certified mail, two Notices of Investigation to Respondent's address of record on file with the State Bar, which was 305 Buckhead Avenue, Atlanta, Ga., 30305. The Postal Service forwarded these two Notices of Investigation to Respondent's post office box pursuant to a change of address notice that had been submitted to the Postal Service six months earlier by Respondent.

The Postal Service left two separate notices of mail in Respondent's post office box, Post Office Box 11813, Atlanta, Georgia, 30305. One notice of certified mail was left in Respondent's box on January 7, 1992 and a second was left on January 13, 1992.

Subsequently, when Respondent did not sign for the certified mail receipts, these Notices of Investigation were returned to the State Bar marked as "unclaimed." The State Bar sent a staff investigator to the Buckhead office premises on or about January 30, 1992 and substantiated that Respondent was not at this address.

The State Bar received information that Respondent had been evicted from his office at 305 Buckhead Avenue and attempted to personally serve Respondent pursuant to Ga.St.Bar 4-204(b) (1992). This attempt was unsuccessful. Therefore, on April 8, 1992, the State Bar of [page 7] Georgia mailed, via registered mail, service copies of the Notices of Investigation to the Buckhead office. This registered mail package was also returned.

Following the service of the Notices of Investigation, the Investigative Panel of the State Bar of Georgia issued a Notice of Discipline requesting disbarment of Respondent based on the allegations of misconduct contained in the Notices of Investigation to which Respondent failed to respond. Again, the Sheriff attempted unsuccessfully to serve the Notices of Investigation at the Buckhead Avenue address. Again on July 2, 1992, the Notices of Investigation were forwarded to Respondent's post office box and again were returned marked as "unclaimed" on August 5, 1002.

The Investigative Panel directed that the State Bar of Georgia file its Notice of Discipline as to Respondent in the Supreme Court of Georgia, pursuant to Ga.St.Bar 4-208.1 (1992) (Exhibit 4).

C. Filing of the Notice of Discipline by the State Bar (July 1992)

The State Bar of Georgia filed a Notice of Discipline recommending disbarment charging Respondent with violations of Standards 4, 21, 22, 23, 28, 30, 40, 45, 47, and 68 of Rule 4-102 of the Rules and Regulations for the Organization and Government of the State Bar of Georgia. The Notice of Discipline charged that the Respondent violated the following:

- Standard 4, which imposed a duty not to engage in unprofessional conduct involving dishonesty, fraud, deceit, or willful misrepresentation;
- Standard 21, which imposed a duty to withdraw when discharged by a client;
- Standard 22, which imposed a duty to avoid prejudice to a client in connection with withdrawal procedures in general;
- Standard 23, which imposed a duty to refund unearned advance paid fees after withdrawal; [page 8]
- Standard 28, which imposed a duty to not reveal the confidences and secrets of a client;
- Standard 30, which imposed a duty to not accept employment where the lawyer's professional judgment is affected by his own personal interests;
- Standard 40, which imposed a duty to not accept payment from someone other than the client except with the consent of the client;
- Standard 45, which imposed duties to refrain from knowingly using perjured or false evidence, engaging in other illegal conduct or conduct contrary to a disciplinary rule and

instituting or settling a claim without authorization;

- Standard 47, which imposed a duty not to communicate with a represented party; and
- Standard 68, which imposed a duty to respond to the State Disciplinary Board Rules during the investigation of the complaint.

The State Bar sent these Notices of Discipline on July 2, 1992 to Respondent's address registered with the State Bar via certified mail.

The Respondent failed to respond to the Notices of Discipline.

D. Initial Disbarment by the Supreme Court of Georgia (January 1993)

On January 8, 1993, the Supreme Court of Georgia entered an order disbarring Respondent from the practice of law. On January 23, 1993, Respondent filed a "Motion to Vacate and Remand for De Novo Proceedings" in the Supreme Court of Georgia in which he contended that he had not been properly served with the Notice of Discipline.

E. Temporary Vacating of Supreme Court of Georgia Order and Remand to the Special Master (February 1993)

On February 18, 1993, the Supreme Court of Georgia temporarily vacated its previous order of January 23 [sic], 1993, and remanded the disciplinary proceeding to the Special Master on [page 9] the sole issue of whether Respondent had been properly served with the Notices of Investigation.

F. Hearing Before the Special Master to Determine Service of Notices of Investigation and Discipline (May 1993)

On May 20, 1993, a hearing was held before the Special Master during which evidence was presented

on behalf of Respondent and the State Bar on the issue of service of the Notices of Investigation and Notices of Discipline. The transcript of the hearing before the Special Master comprises 359 pages. At the hearing before the Special Master, two employees of the Postal Service testified as to the placing of registered mail notices in Respondent's post office box, pursuant to a forwarding request that Respondent had provided to the Post Office in July of 1991. (Transcript of Special Master Hearing, pp. 101-02, 116-21; 175-81). Respondent contended in his testimony that although he regularly checked his post office box, he did not receive a notice of the registered mail delivery. (Transcript of Special Master Hearing, pp. 93-94). The State Bar presented testimony of an attorney who had litigated against Respondent in an unrelated case and who testified that Respondent had failed to claim registered mail deliveries in the context of that litigation. (Transcript of Special Master Hearing, pp. 226-29)

G. Findings of the Special Master (June 4, 1993)

The Special Master entered findings and recommendation on June 4, 1993, concluding:

> [1] The Office of the General Counsel complied fully with the requirements of Bar Rules 4-204.2 to the extent that service of the Notices of Investigation was perfected pursuant to Bar Rule 4-204.2; [2] The Office of the General Counsel complied fully with the requirements of Bar Rules 4-208.2 to the extent that service of the Notice of Discipline was perfected pursuant to Bar Rule 4-208.2; [3] Respondent failed to reject the Notice of Discipline within twenty-three (23) days of service

> as required by Bar Rule 4-208.3; [4] The Respondent did not have actual knowledge of the Notice of [page 10] Investigation, Notice of Discipline or his disbarment until he read about his disbarment on January 20, 1993.
>
> (Report of the Special Master, pp. 00042, 00043).

The Special Master also specifically found, "the Office of the General Counsel complied fully with the requirements of Bar Rules 4-204.2 to the extent that service of the Notices of Investigation was perfected," but found that Respondent had no "actual notice" of the disbarment proceedings. See id. The Special Master's final conclusion was that "as a matter of law ... the State Bar did properly serve the Respondent according to the existing Bar Rules." See id. at 00043. Nevertheless, the Special Master recommended that the "disbarment be set aside and that the Respondent be allowed to address the charges against him in the ... grievances." Id.

H. Order of the Review Panel of the State Disciplinary Board and Referral to Supreme Court of Georgia

The Review Panel of the State Disciplinary Board adopted the recommendation of the Special Master on August 25, 1993, and found that although Respondent had been properly served, he had not been afforded due process and should be allowed to answer the grievances. The Review Panel referred the matter to the Supreme Court of Georgia.

I. Proceedings in the Supreme Court of Georgia Pursuant to Refiling of the Case (September 1993-1994) - Disbarment

Respondent's case was re-filed in the Supreme Court of Georgia on September 3, 1993. The case was briefed and oral argument was conducted on November 16, 1993. Respondent contended that his failure to receive actual notice (as distinguished from constructive notice) of the grievances is a violation of due process, but did not contend[1] that service was not perfected in accordance with Ga. St. Bar 4-204.2 (1992).

The Supreme Court rejected the recommendation of the Review Panel of the State Disciplinary Board and ordered Mr. Bishop disbarred on April 18, 1994, per curiam (4-3 decision). The Supreme Court of Georgia stated:

> Bishop was properly served with the Notices and ... was afforded due process of law....The record reflects that at least six notices were placed in Bishop's post office box arising out of these disciplinary matters. Bishop admits that his post office box was his official address; that he checked the box at least three times a week; that he was aware that two grievances against him were under investigation; and, that he had receive no notice that the grievances had been dismissed or resolved. These facts, together with the other evidence pertaining to Bishop's pattern of failing to claim registered mail, are sufficient to form the basis of a reasonable inference that Bishop knew the nature of the correspondence and deliberately ignored the notices. Under such circumstances, he must accept

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[1] Editor's note: The Proposed Report stated that Respondent "has never contended that service was not perfected ...."

responsibility for the decision to ignore the mailings.

In re W. Kent Bishop, 442 S.E.2d 734, 735 (Ga. 1994).

Respondent's Motion for Reconsideration was filed on April 28, 1994 and was denied on May 13, 1994. Respondent's Second Motion for Reconsideration, filed on May 23, 1994, was denied on June 6, 1994. In these motions for reconsideration, Respondent continued to raise his due process challenges to the notice provision of the State Bar disbarment proceedings.

J. Writs of Habeas Corpus and Coram Nobis Filed in Georgia Supreme Court (1994)

On June 16, 1994, Respondent filed additional proceedings in the Supreme Court of Georgia, including a Motion for a Writ of Habeas Corpus. On June 27, 1994, Respondent filed a Writ of Coram Nobis in the Supreme Court of Georgia. On September 16, 1994, the Supreme Court of Georgia entered an order denying Respondent's "Motion for a Writ of Habeas Corpus and Other Relief" and the "Motion for a Writ of Error Coram Nobis and for Other Relief." (Appendix Attachment 2). [page 12]

III. FILING OF A PETITION FOR A WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT (August 1994) - DENIAL (November 1994); REHEARING DENIED (April 1995)

During the pendency of the Motion for a Writ of Habeas Corpus in the Georgia Supreme Court, Respondent filed a Petition for a Writ of Certiorari in

the United States Supreme Court on August 11, 1994. (Appendix Attachment No. 3). In this petition, Respondent challenged the constitutional sufficiency of the notice of the grievance charges pursuant to the Rules of the State Bar of Georgia. In this petition, Respondent argued that:

> [T]he Georgia case conflicts with recent legislation of Congress, with about half of the service rules in bar disciplinary codes, decisions of the Mississippi and West Virginia supreme courts, the United States Court of Appeals for the Fifth Circuit, and this Court. Moreover, the Georgia case confuses the 'how' (or technique) of service of process with the 'when' (or amenability) of personal jurisdiction.
>
> Bishop, Petition for Writ of Certiorari to the Supreme Court of Georgia in the United States Supreme Court, p. 7 (1994).

This petition for a writ of certiorari was denied on November 7, 1994. Bishop v. State Bar of Georgia, 115 S.Ct. 483 (1994); rehearing denied, 115 S.Ct. 786[2] (1995) (Appendix Attachment 4).

IV. DISBARMENT OF RESPONDENT BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (July 1994)

Following the disbarment by Supreme Court of Georgia, the United States Court of Appeals for the Fifth Circuit administratively issued a show cause order to Respondent. After briefing, Respondent was disbarred in that Circuit on July 15, 1994. The Fifth

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[2] Editor's note: The Proposed Report contains an incorrect page citation.

Circuit's order of disbarment signed by Chief Judge Politz stated:

> W. Kent Bishop has filed a pleading entitled 'Respondent's Showing of Good Cause Why Disbarment Should Not Be Ordered; Request for Oral Argument, Evidentiary Hearing, and Expedited Treatment', in answer to this Court's May 25, 1994 Show Cause [page 13] Order. After review of the response and extensive supporting materials[3], the Requests for Oral Argument and an Evidentiary Hearing are DENIED; the Request for Expedited Treatment is DENIED as moot, and it is HEREBY ORDERED that W. Kent Bishop be disbarred from practice before this court, effective this 11th day of July, 1994.

(Appendix Attachment No. 5) (emphasis supplied).

Respondent did not file a Petition for Certiorari in the United States Supreme Court in this action.

V. DISBARMENT OF RESPONDENT BY UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (January 1995)

Following the disbarment by the Supreme Court of Georgia, the United States Court of Appeals for the Eleventh Circuit administratively issued a show cause order to Respondent. After briefing and review of the Record, the court issued an order of disbarment. On

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[3] [Footnote 1:] This Committee was not privy to the internal records of the Fifth Circuit, but the docket of this Court (N.D.Ga.) indicates that the four volumes of the proceedings before the Georgia State Bar and Supreme Court were forwarded to the Fifth Circuit (See Attachment 10G@N.D. Docket Sheet #6.)

June 15, 1994, the Eleventh Circuit issued a show cause order to which Respondent replied on June 29, 1994. On January 5, 1995, after consideration, the court issued an order of disbarment:

> Upon consideration of Mr. Bishop's response of June 29, 1994 to this Court's order of June 15, 1994, and of the April 18, 1994 order of the Supreme Court of Georgia disbarring Mr. Bishop, it is ORDERED that W. Kent Bishop is disbarred from practice before this Court. Mr. Bishop's requests for oral argument, evidentiary hearing, and expedited treatment are DENIED.

Certiorari in the United States Supreme Court was sought by Respondent and denied. Bishop v. State Bar of Georgia, 116 S.Ct. 215 (1995); rehearing denied, 116 S.Ct. 554 (1995). [page 14]

VI. PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

A. Initial Disbarment Proceedings in the Court Vacated (1993)

Administrative disbarment proceedings resulted in the disbarment of Respondent from practicing in the United States District Court for the Northern District of Georgia on February 2, 1993. However, this order was vacated on February 25, 1993, due to the Supreme Court of Georgia's order vacating its initial disbarment of Respondent.

B. Subject Disbarment Proceeding in this Court (1994)

After the completion of disbarment proceedings in the Georgia courts a copy of the order of disbarment was forwarded to the Clerk of the Northern District of

Georgia. In June, 1994, Judge Orinda Evans of the District Court, relying on the receipt of the disbarment order from the Supreme Court of Georgia and the Local Rule 110-1 of the Local Rules of the United States District Court for the Northern District of Georgia, entered an Order which suspended Respondent from the Bar of the Northern District and directed him to show cause as to why he should not be disbarred. (Local Rule 110-6)) (since renumbered as Local Rule 83.1F).

Respondent filed responsive pleadings that he could demonstrate "good cause" why disbarment should not be ordered. The thrust of Respondent's position was his same argument that he had been denied due process because of the inadequacy of the notice procedures used by the State Bar of Georgia. Respondent accompanied this motion with four volumes of transcripts and proceedings which were before the Georgia Supreme Court. Respondent requested oral argument, an evidentiary hearing and expedited treatment on June 30, 1994. [page 15]

The matter was referred on August 9, 1994, to Judge William C. O'Kelley, who, after briefing and consideration, issued an Order of Disbarment on October 13, 1994. The Court reasoned that under the Court's Local Rules a lawyer's admission to the federal court is derivative of his admission and good standing in the state court, and stated "....the Supreme Court of Georgia ruling qualified as a per se qualification [sic] of professional misconduct."

On October 24, 1994, Respondent filed a Motion to Join Persons and to Amend and Vacate the Order of Disbarment of October 13, 1994. On December 2, 1994, Respondent filed a Motion to Supplement the Record.

On December 29, 1995, Judge O'Kelley denied Respondent's October motion.

Respondent filed letters addressed to Judge O'Kelley on November 6, 1995 and December 18, 1995. (See Appendix Attachment 6).

On January 16, 1996, Respondent filed a Motion for an En Banc Hearing in the Northern District of Georgia. The case was referred to Judge Vining on January 29, 1996. Respondent's Motion for an En Banc Hearing was denied on January 31, 1996. Various other motions were filed by Respondent in the District Court which do not appear to be material at the present time.

VII. APPEAL TO THE ELEVENTH CIRCUIT AND REMAND TO THIS COURT (January 1998)

A. Eleventh Circuit Order

On January 29, 1996, Respondent filed a Notice of Appeal of the disbarment order and he filed an Amended Notice of Appeal on March 1, 1996. The issues were briefed and argued before a panel of the Eleventh Circuit. The Panel consisted of different judges than the Panel which previously considered Respondent's case and ordered Bishop's disbarment in the Eleventh Circuit in 1995. [page 16]

Without reference to the previous disbarment in the Circuit, the Panel vacated and remanded Respondent's case on January 7, 1998, and stated, "the district court abused its discretion in disbarring appellant Winford Bishop based on its finding that the Georgia Supreme Court's disbarment of Bishop' qualifie[d] as a per se verification of professional misconduct.' We vacate and remand with instructions that the court conduct an analysis of this case pursuant to the factors set forth in Selling v. Radford, 243 U.S. 46

(1917)." In re Winford Kent Bishop, 96-8136 at 1-2 (alteration in original).

B. Remand to this Court and Other Motions in District Court

The mandate was made the judgment of the District Court on May 8, 1998. Following entry of the mandate, Respondent filed various motions in the District Court, including, but not limited to, a Motion to Disqualify the Judges of the Northern District of Georgia; Motion That District Court Request the Eleventh Circuit To Appoint A Presiding Judge Not A member of the State Bar of Georgia From Without The Eleventh Circuit; Motion to Present Summary Evidence of Prima Facie Case of Race and Sex Discrimination Practiced Against Petitioner and various other motions set forth in the Appendix attached hereto.

VIII. THIS COURT'S REFERRAL TO DISCIPLINARY COMMITTEE (1999)

A. Order of Court – Investigation Directed

On January 7, 1999, the United States District Court for the Northern District of Georgia entered an order stating, "This court ... cannot rely upon the state disbarment order to disbar Bishop from practicing in this court. Consequently, the court will not disbar Bsihop based upon his disbarment by the [Supreme Court of Georgia]." The Court further stated, "However, because Bishop has been disbarred by the Georgia Supreme Court and by the Court of Apppeals for the Eleventh Circuit, the court concludes that Bishop's professional character has been called into question." This Court then referred Respondent's case to this Committee, "so that the [page 17] committee can investigate the charges of misconduct made

against Bishop and make a written report to this court as to the proper action to take." Respondent appealed this Order to the Eleventh Circuit.[4]

B. Proceeding by the Committee

On April 7, 1999, the Chairman of the Committee notified Respondent by letter that the Committee "determined that there is probably [sic] cause to initiate an investigation" and that Respondent could respond in writing "to the matters giving rise to the referral." On April 13, 1999, Respondent sent the Committee a certified letter/brief questioning, among other matter, probable cause and jurisdiction, and requesting an extension of time to respond to "the merits of the April 7th letter." (Exhibit 9). On May 18, 1999, Judge Tidwell issued an order granting Respondent an extension of time to respond to the Committee's investigation on the condition that Respondent agreed not to represent any clients in this Court until the conclusion of the disciplinary proceedings against him. The Committee is not aware of any further response by this Respondent or filing in the District Court, other than those pleadings following this Committee's Proposed Report which are discussed in Section X below.[5] The Committee has proceeded with the investigation ordered by the Court.

IX. INVESTIGATION AND REVIEW CONDUCTED BY COMMITTEE [page 18]

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[4] [Footnote 2:] On September 28, 1999, the Eleventh Circuit dismissed for lack of jurisdiction, Respondent's Appeal of Judge Vining's Referral Order of January 5, 1999, holding that this Order merely constituted a referral and was neither a final appealable judgment nor subject to the Collateral Order doctrine.

[5] Editor's note: The Proposed Report did not contain the following language: "other than those pleadings following this Committee's Proposed Report which are discussed in Section X below."

Consistent with the guidance provided by Selling and Calvo and other cases herein cited, the Committee has independently conducted an extensive, in-depth investigation of this matter. The Committee has focused its investigation on the record before the Supreme Court of Georgia. It has scrupulously examined the nature and gravity of the charges of misconduct originally filed against Respondent and all proceedings in the State Court. Further, the Committee followed the extensive procedural history and complicated pleadings and briefs in every forum known to the Committee in which Respondent has challenged either his disbarment by the Georgia Supreme Court or his disbarment in this Court. The investigation by the Committee has included reading and digesting the numerous documents underlying the extensive procedural history of this case set forth above, including, but not limited to, a review of the following listed below. The Committee lists the full docket proceedings in the State Court:

- Entire record of the Supreme Court of Georgia pertaining to the state disbarment proceedings intitated against Respondent, including the various pleadings filed on behalf of and by Respondent and the various orders of the Supreme Court of Georgia;
- Two grievances filed against Respondent; and the files of the State Bar of Georgia pertaining to this matter;
- In its investigation, the Committee reviewed the two grievances which resulted in the initiation of the State Bar Disciplinary proceeding. The purpose of the review was not to make findings of fact but to determine the materiality of the

grievances. Per Calvo, this is not a *de novo* review.

- All proceedings before the Special Master beginning on May 20, 1993, including the testimony and oral arguments of the Respondent, reflected in a 359 page transcript. [page 19]
- The relevant portions of the records of the Supreme Court of Georgia concerning this matter, comprising 29 individual documents including:

9/23/93	State Bar's Response to Respondent's Exceptions to Report of the Review Panel;
9/23/93	Respondent's Exceptions to Report of the Review Panel;
9/23/93	Respondent's Motion to Supplement the Record;
9/23/93	Respondent's Brief;
9/23/93	State Bar's Request for Oral Argument;
10/13/93	Respondent's Rebuttal to State Bar's Exceptions to Report of the Review Panel;
10/13/93	Respondent's Response to State Bar's Request for Oral Argument;
10/13/93	State Bar's Response to Respondent's Exceptions to Report of the Review Panel;
11/30/93	State Bar's Supplemental Brief;
12/13/93	Respondent's Post-Oral Argument Brief;
1/3/94	Respondent's Supplemental Brief;

1/26/94	State Bar's Response to Respondent's Second Supplemental Brief;
2/8/94	Respondent's Rebuttal to State Bar's Response to Supplemental Brief;
4/18/94	Opinion of Supreme Court;
4/28/94	Respondent's Motion for Reconsideration; [page 20]
5/13/94	Supreme Order on Motion for Reconsideration;
5/23/94	Respondent's Motion for Reconsideration of 5/13/94 Order;
6/1/94	State Bar's Response to Respondent's Motion for Reconsideration of 5/13/94 Order;
6/2/94	Respondent's Certificate of Compliance;
6/6/94	Supreme Court Order on Second Motion for Reconsideration;
6/6/94	Verification of Respondent's Motion for Habeas Corpus and Other Relief;
6/16/94	Respondent's Motion for Habeas Corpus;
6/27/94	Respondent's Motion for Writ of Coram Nobis
6/27/94	State Bar's Response to Motion for Habeas Corpus;
7/1/94	Respondent's First Amendment to Motion for Reconsideration;
7/19/94	State Bar's Response to Recent Motions;

8/31/94 Respondent's Second Amendment to Motion for Reconsideration, etc.;
9/16/94 Order of Supreme Court.

- Pleadings and briefs in the Supreme Court of the United States;
- Orders of the United States Court of Appeals for the Fifth and Eleventh Circuits disbarring Respondent from practicing in those courts; [page 21]
- Orders and briefs in the United States Court of Appeals Eleventh Circuit on the second appearance in that Court;
- The Disciplinary Committee file as to the disbarment of Respondent, including his letter/brief to the former Chairman of the Disciplinary Committee, Mr. Nick Chilivis, dated April 13, 1999, in which Respondent essentially presented his Response to the Remand Order of the Eleventh Circuit and to the January 7, 1999 Order of Judge Vining;
- Pleadings, brief and orders of this Court;
- Review of legal authorities relating to federal disbarment based on state proceedings, particularly Selling and Calvo.

The Committee has made an independent review of these documents, pleadings and transcripts of proceedings and orders; i.e., the record underlying the predicate state disbarment by the Supreme Court of Georgia.

A. Application of the Selling Factors

Selling held that although membership in the state bar is a prerequisite to admission to the bar of the United States Supreme Court, the fact that an attorney ceases to be a member of the state bar does

not automatically justify disbarment from the Supreme Court. See id. at 51. See also, In re Calvo, 88 F.3d 962 (11th Cir. 1996); Theard v. United States, 354 U.S. 278, 77 S.Ct. 1271 (1957) (explaining, *inter alia*, that federal and state judicial systems of courts have autonomous control over their officers, including attorneys). In Selling, the Court held that the state court disbarment should be recognized and given its full effect unless from "intrinsic consideration of the state record," one or all of the due process conditions set out below are met. Id. at 51. Calvo stated that the "burden is on the disbarred attorney to show good cause why he should not be disbarred." at 967. [page 22]

1. The First Selling Factor: Due Process

Whether the state procedure from want of notice or opportunity to be heard was wanting in due process?

In Calvo, the Eleventh Circuit provided guidance on this factor stating, "[t]he first prong of Selling concerns due process, which is narrowly defined, in this context, as 'want of notice or opportunity to be heard.'" Id. at 967 (Calvo, like Respondent, alleged that he received inadequate notice of the Florida Bar's charges and that, thus, he was not informed in advance of the hearing that he might be disbarred). In various ways, Respondent here alleges that he had "inadequate notice" which denied him due process. Respondent's most succinct statement of his position may be found in his Petition for Writ of Certiorari to the Supreme Court of Georgia in the Supreme Court of the United States: "While petitioner is not arguing that state service by mail provisions are invalid under the [Fourteenth] Amendment, he is saying that actual notice must result from the use of the

state's mail service statute or court rule." Bishop, Petition for Writ of Certiorari to the Supreme Court of Georgia in the United States Supreme Court, at p. 7. The practical effect of this position would be to eviscerate the constructive notice provision; that is to satisfy due process, a respondent would always have to receive actual notice - even if he were attempting to avoid service. Thus, effectively Respondent is contending that the Georgia service and notice procedures are invalid.

The Committee's investigation considered whether there is anything unique or irregular about the notice provisions of Georgia Bar Rules on Discipline. The procedure is neither unique nor irregular. Similar procedures are used by other states. The State service by registered mail procedures are valid on their face.

With respect to the application of these procedures, the Supreme Court of Georgia appointed a Special Master on this matter, particularly to investigate the issue of notice and [page 23] service. The Special Master's Report makes it clear that the State Bar "complied fully" in every respect with the Bar Rules requirements for Notices of Investigation and Discipline. The Special Master further found that "as a matter of law, ... the State Bar did properly serve the Respondent according to the existing Bar rules." Report of Special Master, p. 00043.[6]

The Committee noted that the Special Master found that Respondent did not have actual knowledge of the disciplinary proceedings against him, that he was not afforded due process of law, and

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[6] Editor's note: At this point, the Proposed Report states incorrectly: "Respondent did not take exception to the findings of the Master Report."

recommended that the disbarments be set aside. The Review Panel of the Bar agreed with this recommendation. The Supreme Court of Georgia addressed this very issue, considered it and declined to adopt the recommendation of the Special Master and Review Panel on this issue. The Supreme Court reviewed the facts surrounding the notices that were given in this case and found that the facts were "sufficient to form the basis of a reasonable inference that Bishop knew the nature of the correspondence and deliberately ignored the notices. Under such circumstances, he must accept responsibility for his decision to ignore the mailings." The Court then stated "[t]his Court finds that Bishop was properly served with the Notices and that he was afforded due process of law." In re W. Kent Bishop, 442 S.E.2d at 735. There were three dissents on the Court. It is recognized that reasonable persons might disagree whether the matter should have been opened; however, as a matter of law, Respondent received due process.

Under Selling, the Committee finds that there were no infirmities in the State's notice procedures on their face or as applied.

2. The Second Selling Factor: Sufficiency of Proof

Whether there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on the Court's part that it could not, consistently with its duty, except [sic] as final the conclusion on that subject? [page 24]

The Eleventh Circuit in Calvo defined the second prong of Selling as one concerning "the sufficiency of the state court's proof." at 967. In his

arguments, Respondent makes no particular case on this factor of the Selling analysis. The basic issue on this prong in this case is again notice and opportunity for hearing. The Committee points to the Special Master Report in the state proceedings containing some 357 [sic] pages of testimony and argument regarding the State Bar procedures for notice and service and how they were carried out. The entire Transcript was scrutinized by the Committee. There was ample testimony from both parties in this matter. As pointed out above, the Special Master found that the State Bar had fully complied with the notice and service rules of the State Bar. The Supreme Court of Georgia discussed the issues of proof in its Opinion and found no failure of proof.

The Committee finds no infirmity of proof in the state proceedings on disbarment applying the second prong of Selling.

3. The Third Selling Factor: Principles of Right and Justice

Whether some other grave reason existed which should convince the Court that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon the Court not to disbar except upon the conviction that, under principles of right and justice, the Court was constrained to do so?

The Calvo Court defined the third prong of Selling as requiring consideration of whether disbarment is proper "under the principles of right and justice." Calvo, 88 F.3d at 967.

The Committee has sought and reviewed case authority in the area to see what types of proceedings might reflect an infirmity of due process under principles of right and justice. For example, in Theard v. United States, 354 U.S. 278, 77 S.Ct. 1271 (1957), the

Court found that this third prong had not been met when a federal court was asked to enforce a disbarment of a lawyer for a forgery committed eighteen years before, when he was suffering from an "abnormal [page 25] mental condition, some degree of insanity" at the time of the forgery and was "committed to an insane asylum." at 279. Theard was released from the asylum and the criminal prosecution regarding the forgery was unsuccessfully revived, bringing on his disbarment by the State of Louisiana. At the disbarment proceeding it was shown that the lawyer, after recovering his capacity, had been an active practitioner for six years proceeding *[sic]* the disbarment including the argument of 36 cases before the Louisiana Supreme Court and the Court of Appeals in New Orleans. The Court in remanding this matter stated: "We do not think that the 'principles of right and justice' require a federal court to enforce disbarment" of this man; and it went on to say that the circumstances did not "require automatic acceptance by a federal court of the state disbarment in the circumstances of this case." Id. at 282. The case was remanded for disposition of the disbarment under the Court's general rules. The Theard case presented unusual and unique facts which might lead the federal court to not automatically disbar on the basis of the state disbarment.

The Committee finds nothing in the record of the state court proceedings herein which presents unique facts or "grave reason" which would cause manifest injustice to Respondent under the circumstances of this case. The Committee has found no evidence of any bias on the part of the State Bar, the Special Master or the Court in administering this case.

The Committee finds no infirmity in the State proceedings under the third factor of Selling.

The Committee reviewed the available records of the various federal courts who have considered Respondent's disbarment. In at least three federal courts, Respondent has raised the same due process arguments without success. While recognizing that there is no precedential value, Respondent's assertions have been taken to the Supreme Court of the United States on [page 26] certiorari twice with denial based on the same record that was before the Supreme Court of Georgia. Likewise, the Fifth and Eleventh Circuits have on the same record disbarred Respondent. It stands to reason that if there was some injustice or wrong visited upon Respondent in the State proceedings, it would have been picked up by one of the three other courts.

X. PROPOSED REPORT - RESPONDENT'S PLEADINGS

Consistent with the Local Rules, the Committee, after completing its investigation, prepared its Proposed Report, which was submitted to Respondent on July 2, 2001. Respondent objected to the Proposed Report and requested a hearing. A hearing was set for August 24, 2001.

Respondent has filed three sets of pleadings. On August 13, 2001, prior to the hearing, Respondent initially filed various pleadings with the Clerk of Court and with the Committee. Such pleadings are made a part of this Report; Exhibit 11 of the Report is Respondent's Certificate of Filing (a list of various pleadings); Exhibit 12 is one of those pleadings, Motion to Vacate, Set Aside and Objection to the Proposed Report of the Committee. Respondent's remaining

pleadings from this initial filing, containing various affidavit testimony and argument (mostly relating to the merits of the State Bar grievances against Respondent) are included in the Appendix as Attachments 8 through 16.

On September 5, 2001, following the hearing, Respondent filed a second group of pleadings with the Clerk and with the Committee. A Certificate of Filing (list) of these pleadings is attached to this Report as Exhibit 13. The individual pleadings themselves are attached to the Appendix as Attachments 17 through 21.

On September 27, 2001, Respondent filed a third pleading entitled Motion for Leave to File a Second Amended Motion to Vacate, Set Aside, and Objection to Proposed Report and Its Findings, etc. This pleading is attached to the Appendix as Attachment 22. [page 27]

With the exception of the issue related to the Committee's procedure (which is discussed below), the issues raised in all of these pleadings were an elaboration on issues previously raised by Respondent in various forums relating to his disbarment.

XI. HEARING BEFORE COMMITTEE AND RECONSIDERATION

The hearing was held on August 24, 2001, in Room 2327 of the United States District Courthouse in Atlanta. All Committee members were present. Respondent was represented by counsel, Mr. James Spence. A transcript of the hearing has been filed with the original record in this Court.

The Committee's position was stated in the Proposed Report, which had been supplied to Respondent. Respondent was allowed to present

testimony and evidence and to make argument on any issue raised by his objections, except oral testimony regarding the State Bar grievances an related arbitration, which testimony was received otherwise in writing in his pleadings.

Respondent presented four character witnesses (one by affidavit) and his own testimony. Some of this testimony regarding Respondent's legal talents was particularly compelling. Respondent's legal talents and resourcefulness have been obvious to the Committee based on the myriad pleadings and arguments which he has raised on his own behalf. Albeit, Respondent's legal competence was not the focus of the Committee's analysis.

Both Respondent and his counsel presented Respondent's position on a number of the issues raised by his pleadings and in the Proposed Report. One particular issue requires comment. Respondent had both general and specific objections to the manner in which the Committee conducted its investigation. More specifically, Respondent agreed that the Committee performed a Selling analysis of the matter. However, it was Respondent's position that the District Court (per Judge Vinings' [sic] Order, Exhibit 1 hereto) had already conducted a Selling analysis; that the Committee in essence conducted a "second" Selling analysis; and that [page 28] the Committee should have conducted an evidentiary hearing on the substance of the State Bar grievances which formed the basis of the State Bar's proceeding against the Respondent. Respondent's position is incorrect. The Committee determined that it was the District Court's intention and direction to have this Committee conduct the Selling analysis, which it has done. In this regard, the

Report discusses in detail the scope of the Committee's investigation (see pp. 3-4 above) and analysis based on Selling and its progeny, particularly the Eleventh Circuit authority in Calvo, which makes clear that a federal court in examining a state disbarment proceeding "is not required to conduct a *de novo* trial in the first instance of [the attorney's] fitness to practice law." While as part of its general analysis the Committee reviewed all of Respondent's pleadings and testimony, including those involving the State Bar grievance, it made no attempt to weigh the merits of these underlying grievances. The Committee accepted Respondent's testimony and argument on this issue to complete the record.

One other issue that has been raised in various forums prior to this investigation also requires comment. While stated indifferent ways, Respondent contends that he received disparate treatment by both the State Bar and the Supreme Court of Georgia. Among other allegations Respondent, who is Caucasian, alleges "reverse discrimination" by both the State Bar and the Georgia Supreme Court. Respondent offered evidence on this issue. The Committee reviewed this issue in compiling its Proposed Report and at the hearing, and investigated the matter further after the hearing. It was found to be without merit.

Following the hearing, the Committee reconsidered its position and findings set forth in the Proposed Report, and engaged in further investigation regarding certain matters which were raised at the hearing by Respondent and his counsel and in further pleadings which were filed. [page 29] After reconsideration, the Committee determined that it

would adhere to its original findings and recommendation set forth in Section XII hereof.

XII. SUMMARY OF FINDINGS

Pursuant to the direction of this Court and with guidance provided by the Eleventh Circuit in Calvo, the Committee has conducted the requisite Selling analysis. The basic issue for the Committee's review in its investigation is whether the state procedures resulting in Respondent's state disbarment contained infirmities identified in Selling that precluded Respondent from receiving due process.

In applying the Selling factors to the record serving as a predicate for Respondent's disbarment, the Committee has found the following:

(1) The record of the State Court proceedings reveals no infirmities in the state's notice procedures on their face or as applied; and

(2) The record of the State Court proceedings reveals no infirmity of proof in the state proceedings; and

(3) The record of the State Court proceedings reveals no unique factors which would cause manifest injustice to Respondent under the circumstances of this case.

After a thorough and independent review of the "record underlying the predicate state disbarment," the Committee finds that this record does not reveal "the kind of infirmities identified in Selling." Calvo at 967.

Based on its investigation, the Committee finds no reason why this Court should not recognize the State proceeding on Respondent's disbarment and give it full effect in this Court.

WHEREFORE, having completed the investigation referred to it by this Honorable Court, the

Committee respectfully submits this as its unanimous Report to the Court. [page 30]

This 12th day of October, 2001.

Respectfully submitted,

/s/ Susan V. Boleyn
Susan V. Boleyn

/s/ Bernard Taylor
Bernard Taylor

/s/ Gerry E. Holmes
Gerry E. Holmes

/s/ Jeffrey M. Todd
Jeffrey M. Todd

/s/ Byron Attridge
Byron Attridge, Chairman

EXHIBITS TO REPORT omitted
APPENDIX [with 22 Attachments] omitted

Filed: Jan. 7, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In the matter of :
WINFORD KENT BISHOP: Disciplinary Action

ORDER

By order dated October 12, 1998 *[sic]*, this court disbarred Winford Kent Bishop from the bar of this court. The basis of that disbarment order was the fact that Bishop had been disbarred by the Supreme Court of Georgia; this court's Local Rules require that a person must be a member in good standing of the State Bar of Georgia in order to remain a member of the bar of this court. In that order, the court held that disbarment by the Supreme Court of Georgia was sufficient to disbar him from this court. Bishop appealed that disbarment to the Court of Appeals for the Eleventh Circuit. The Eleventh Circuit held that this court had abused its discretion in finding that disbarment by the Georgia Supreme Court qualified as a per se verification of professional misconduct. The Eleventh Circuit vacated this court's disbarment order and remanded the matter so that this court could conduct an analysis pursuant to Selling v. Radford *[sic]*, 243 U.S. 46, 37 S.Ct. 377 (1917).

Bishop has filed a motion asking that the court disqualify all current judges of this court from considering the case on remand [Doc. No. 26]. He contends that in deciding to disbar him, the judges acted as adjudicators and, thus, became parties to the

action. He further contends that because costs may be assessed [page 2] against the judges, they have a financial interest in the outcome of the case and are, thereby, disqualified. Bishop has cited no case which holds that a court may not "adjudicate" a disbarment. Indeed, the only entity which can disbar a member of the bar of this court is the court itself. Additionally, Bishop has cited no statute or case which holds that an attorney is entitled to costs or attorney's fees when he challenges a disbarment. Because the court finds no basis for disqualifying the judges of this court in Bishop's disbarment proceedings, that motion is DENIED.

In *Selling v. Radford* the United States Supreme Court held that a federal court may rely upon a state court disbarment to disbar an attorney from practicing before it

> unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure, for want of notice or opportunity to be heard, was wanting in due process; 2. That there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on [the court's] part that [it] could not, consistently with [its] duty, accept as final the conclusion on that subject; or 3, that some other grave reason existed which would conflict with the duty which rests upon [the federal court] not to disbar except upon the conviction that, under the principles of right and justice, [the court] were constrained so to do.

Selling v. Radford, 243 U.S. at 51, 37 S.Ct. at 379.

In disbarring Bishop, the Georgia Supreme Court did not make any factual findings regarding Bishop's character but, instead, relied upon the fact that he never responded to the notices of disciplinary action that had been mailed to him. Therefore, this court concludes that it cannot rely upon the state disbarment order to disbar Bishop from practicing in this court. Consequently, the [page 3] court will not disbar Bishop based upon his disbarment by the Georgia Supreme Court. Because of this determination, all other pending motions in this action are rendered moot.

However, because Bishop has been disbarred by the Georgia Supreme Court and by the Court of Appeals for the Eleventh Circuit, the court concludes that Bishop's professional character has been called into question. Therefore, the court requests that the Chief Judges of this court refer Winford Kent Bishop to the court's Committee on Discipline, *see* Local Rule 83.1(F)(5), so that the Committee can investigate the charges of misconduct made against Bishop and make a written report to this court as to the proper action to take.

SO ORDERED, this 5th day of January, 1999.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
Senior United States District Judge

January 28, 1999

The Honorable Robert L. Vining, Jr.
600 East First Street, #345
P.O. Box 6226
Rome, Georgia 30161

Re: Winford Kent Bishop

Dear Bob:

I have received a copy of your order dated January 5, 1999 relative to Winford Kent Bishop.

It seems to me that before this matter can be referred to the Disciplinary Committee the specific facts and conduct in question should be detailed in writing. From a review of your order, I am not sure what conduct the committee would be charged with investigating.

Also, as I read our rules, and in particular Local Rule 83.1(F)(2) [p. CV-66], a written statement of the circumstances out of which the charges arose is required.

If you agree, would it be possible for you to furnish me a written specification of the charges so that I might forward the specifications to our Disciplinary Committee.

With kindest personal regards, I am

Yours very truly,

G. Ernest Tidwell

GET: sw

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
Post Office Box 6226
600 East First Street
Rome, Georgia 30162-6226
February 2, 1999

Robert L. Vining, Jr. (706) 291-5671
Senior Judge

Chief Judge G. Ernest Tidwell
United States District Court
1967 United States Courthouse
75 Spring Street, S.W.
Atlanta, Georgia 30303-3361

Re: Winford Kent Bishop

Dear Ernie:

Thank you for your letter dated January 28, 1999, regarding Mr. Bishop and my order dated January 5, 1999.

Since the Georgia Supreme Court disbarred Mr. Bishop as a result of his failing to respond to the notices of investigation mailed to him and did not reach the merits of the two disciplinary complaints that had been filed against him, *see* In the Matter of Winford Kent Bishop, 264 Ga. 241 (1994), it is my understanding that our disciplinary committee would be charged with investigating those two complaints.

With best personal regards, I remain

Sincerely yours,
/s/ Robert
Robert L. Vining, Jr.

Filed: Jan. 31, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12061-GG

IN THE MATTER OF:

WINFORD KENT BISHOP,

Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

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BEFORE: ANDERSON, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by Appellant, Winford Kent Bishop *[sic]* is DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

ORD-41

Filed: Jan. 31, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12061-GG

IN THE MATTER OF:

WINFORD KENT BISHOP,

Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____ F.2d *[sic]* _____).
Before: ANDERSON, DUBINA and BARKETT, Circuit Judges.
PER CURIAM:
The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.
ENTERED FOR THE COURT:
/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE ORD-42 (12/01)

Filed: Oct. 13, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In the Matter of: :
WINFRED *[sic]* KENT BISHOP :Disciplinary Action
Georgia Bar No. 058900
:

ORDER

The captioned case is before the court for consideration of the pending disbarment of Winford Kent Bishop ("Bishop") in the Northern District of Georgia.

Judge Orinda D. Evans entered a disbarment and "show cause" order on June 1, 1994 in her capacity as duty judge. Bishop filed a response to the "show cause" order on June 30, 1994.

On April 18, 1994 the Supreme Court of Georgia (4-3) entered an order directing Bishop's disbarment. The complaints against Bishop related to his handling of a child support modification case. The procedural history preceding the Supreme Court of Georgia's order is contained in Judge Evans' order attached hereto.[7] In simplest terms, Bishop contests the adequacy of the notice procedures used by the State Bar, and alleges a litany of constitutional violations in his response to the "show cause" order.

Before reaching the substantive issues of this disciplinary action, it is worth noting that this court has

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[7] [Footnote 1:] Judge Evans' order incorporates verbatim the Supreme Court of Georgia order, which includes a chronological description of the disbarment proceedings.

elected not to refer this matter to the Committee on Discipline. While Bishop's case is arguably within the scope of the committee's duties as defined in [page 2] Local Rule 110-6(e), the court has determined that their review is not necessary. Local Rule 110-1(a) states (emphasis added): "Any attorney who is an active member of the State Bar of Georgia is eligible for admission to the bar of this Court. Continued membership in this Court's bar is **contingent on an attorney's maintaining his active status in good standing with the State Bar of Georgia**." Thus it is clear that under the local rules one who is disbarred by the State Bar of Georgia, who by definition is not an active status member in good standing, is subject to disbarment from the bar of the Northern District of Georgia as well. Local Rule 110-6(a) implements this rule. The Supreme Court of Georgia ruling qualifies as a per se verification of professional misconduct, thereby eliminating the need for a committee investigation. This conclusion is premised on the fact that the committee's purpose is to conduct an investigation with the goal of ascertaining the existence, or lack thereof, of professional misconduct.

Bishop's response to the "show cause" order attempts to demonstrate good cause as to why he should not be disbarred. As noted, the motion challenges the substantive basis of the disbarment, the procedural due process which Bishop alleges that he was denied, and other alleged constitutional violations. These same issues are being raised in a petition for *certiorari* filed with the United States Supreme Court. Notwithstanding the remote chance that the U.S. Supreme Court will accept this case for review, this court will not hold a hearing or rule on these issues.

For purposes of this disciplinary action, Bishop's disbarment from the State Bar of Georgia [page 3] is sufficient to justify his disbarment from the bar of the Northern District of Georgia.

One further issue warrants attention. In his response Bishop contends that Local Rule 110-1(a) is invalid, both on its face and as applied. In terms of facial invalidity, Bishop argues that it is "irrational" because membership in the State Bar of Georgia is not of particular assistance to practicing law in federal court in the Northern District, specifically because diversity jurisdiction is of declining importance. This argument is without merit. The only case cited, Madden v. Cleveland, 105 F.R.D. 520 (N.D.Ga. 1985) (Vining, J.), for the proposition that a local rule can be held invalid, dealt with the invalidity of a local rule concerning the time from which the period for answering a complaint is measured. The fact that a local rule can theoretically be held invalid by the district court is not determinative as to the validity of any particular rule. Bishop also contends the rule as applied to him is invalid, in that if the Supreme Court of Georgia deprived him of his rights "it would be ironic, irrational, and Dickensian to turn around and still disbar him because the rules require him to be a member of the State Bar of Georgia that was instrumental in getting him unconstitutionally disbarred in the first place." Respondent's Motion at 102. This argument presupposes a review by this court of the constitutionality of the Supreme Court of Georgia's actions. As a matter of ripeness, however, this court lacks jurisdiction to make such a determination, in that there is not a suit before this

court between the two parties in interest - Bishop and the State Bar of Georgia. [page 4]

After careful consideration, and in accord with Local Rule 110-6(d), it is hereby ordered that Winfred *[sic]* Kent Bishop, Georgia Bar No. 058900, is disbarred from practice before the courts of the Northern District of Georgia.

IT IS SO ORDERED this 12th day of October, 1994.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
Chief United States District Judge on Behalf of the United States District Court, Northern District of Georgia

Filed: Jun. 1, 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

IN RE: WINFORD KENT BISHOP
DISCIPLINARYACTI
ON
GEORGIA BAR NO. 058900

ORDER

It appearing to the Court that an order was entered in the Supreme Court of Georgia on April 18, 1994, in the matter of W. Kent Bishop, attorney at law, providing as follows:

Summary of the Order.
PER CURIAM.

In 1991, two separate disciplinary proceedings were commenced against W. Kent Bishop. On January 3, 1992, the State Bar mailed two Notices of Investigation regarding these actions via certified mail to Bishop's address at 305 Buckhead Avenue. This address was the address of record with the State Bar. The post office subsequently, pursuant to a change of address notice which Bishop submitted six months earlier, forwarded the Notices of Investigation to Bishop's post office box (a box which Bishop had shared with his parents for years). The post office left two separate notices in Bishop's box regarding the certified mail on two different occasions - January 7, and again on January 13, 1992. After Bishop failed to retrieve the

mail, the post office returned the Notices of Investigation to the State Bar.

On January 30, 1992, the State Bar learned via an investigator that Bishop had been evicted from his office at 305 Buckhead Avenue. The State Bar subsequently attempted personal service on Bishop at this address; however, on March 31, 1992, the Sheriff of Fulton County returned service non est inventus. On April 8, 1992, the State Bar mailed service copies of the Notices of Investigation via registered mail to the same address; the post office subsequently returned the mail to the State Bar.

The Investigative Panel then met and voted to issue a Notice of Discipline requesting the disbarment of Bishop for the numerous instances of misconduct set forth in the Notices of Investigation. The Fulton County Sheriff attempted to serve the Notices at the 305 Buckhead Avenue address, however, service was unsuccessful.

On July 2, 1992, the State Bar sent to *[sic]* the Notices of Discipline via registered mail to the 305 Buckhead Avenue address. The mail was, as previously, forwarded to Bishop's post office box, but subsequently returned to the State Bar "unclaimed." Pursuant to Bar Rule 4-208.1 et seq. (notice of discipline), the Investigative Panel recommended to this Court that Bishop be disbarred from the practice of law in Georgia. This Court ordered the disbarment.

Bishop, after learning of his disbarment in the Fulton County Daily Report, objected, arguing, inter alia, lack of service. This Court then

appointed a Special Master to determine whether Bishop had been properly served.

At the hearing before the Special Master, two post office employees testified that notices for registered mail packages were customarily placed in patrons mailboxes, and that such notice was placed in bishop's (sic) box on July 3, 1992. Additional testimony at the hearing indicated that Bishop had not claimed a registered mail package sent by an opposing counsel in a separate case. Also, supporting testimony indicated that Bishop did not know of the disciplinary proceedings or of his disbarment until he read it in the Fulton County Daily Report.

The Special Master found that the State Bar complied fully with the requirements of notice under Bar Rules 4-204.2. The Special Master, however, further found that Bishop did not have actual knowledge of disciplinary proceedings against him or of his disbarment, and that he had not been afforded due process of law. The Special Master thus recommended that Bishop's disbarment be set aside and that he be allowed to address the underlying charges against him. The Review Panel agrees and moves this Court likewise.

After considering the record in this case, this Court does not adopt the recommendation of the Review Panel.

This Court finds that Bishop was properly served with the Notices and that he was afforded due process of law. Bishop was served at the address which he listed with the membership department of the State Bar. He failed to inform

the State Bar of his new address, and thus the State Bar was authorized to rely on the address of record in the membership department.

The record reflects that at least six notices were placed in Bishop's post office box arising out of these disciplinary matters. bishop (sic) admits that his post office box was his official address; that he checked the box at least three times a week, that he was aware that two grievances against him were under investigation; and, that he had received no notice that the grievances had been dismissed or resolved. These facts, together with the other evidence pertaining to Bishop's pattern of failing to claim registered mail, are sufficient to form the basis of a reasonable inference that Bishop knew the nature of the correspondence and deliberately ignored the notices. Under such circumstances, he must accept responsibility for the decision to ignore the mailings.

Consequently, we hereby order that Bishop is disbarred from the practice of law in Georgia, and is reminded of his duties under Bar Rule 4-219(c) to timely notify all clients of his inability to represent them, to take all actions necessary to protect the interest *[sic]* of his clients, and to certify to this Court that he has satisfied the requirements of such rule.

All the Justices concur, except Hunt, CJ., Sears-Collins and Carley, JJ., who dissent.

IT FURTHER APPEARING to this Court that continued membership in the bar of this Court is contingent upon the attorney maintaining his active

status in good standing *[sic]* the State Bar of Georgia (LR 110-1(a)),

IT IS THEREFORE ORDERED:

(1) that Winford Kent Bishop be suspended from the bar of this Court;

(2) that this Order shall become effective as an order of disbarment from the Court's bar thirty (30) days following this date unless proceedings consistent with LR 110-6(a) have been initiated by the attorney; and

(2) *[sic]* that the Office of the Clerk advise Winfo. d Kent Bishop of this action by forwarding a copy of this Order by certified mail to the last known address.

IT IS SO ORDERED this 1 day of June, 1994

/s/ Orinda D. Evans
UNITED STATES DISTICT JUDGE

Filed: Jan. 7, 1998
[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8136

D.C. Docket No. 058900 (State Bar Number)

IN THE MATTER OF:

WINFORD KENT BISHOP,
Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(January 7, 1998)

Before HATCHETT, Chief Judge, GODBOLD and RONEY, Senior Circuit Judges.

PER CURIAM:

The district court abused its discretion in disbarring appellant Winford Bishop based on its finding that the Georgia Supreme Court's disbarment of Bishop "qualifie[d] as a per se verification of professional misconduct." We vacate and remand with instructions that the court conduct an analysis of this

case pursuant to the factors set forth in Selling v. Radford, 243 U.S. 46 (1917).*

VACATED AND REMANDED.

* Because of our disposition of this case, we decline to address Bishop's remaining issues.

Filed: Apr. 8, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8136

IN THE MATTER OF:

WINFORD KENT BISHOP,
Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

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BEFORE: HATCHETT, Chief Judge, GODBOLD and RONEY, Senior Circuit Judges.

BY THE COURT:

Appellant's motion for attorney's fees and costs is DENIED WITHOUT PREJUDICE to renewal should Appellant ultimately prevail in these proceedings. 28 U.S.C. [Section] 2412(a)(1); Farrar v. Hobby, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). This order should not be construed as expressing any opinion as to whether Appellant is entitled to attorney's fees and/or costs should he so prevail.

Filed: Sep. 28, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-8264

In The Matter of:
WINFORD KENT BISHOP

Appeal from the United States District Court for the Northern District of Georgia

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Before COX, BLACK, and BARKETT, Circuit Judges.
BY THE COURT:

This appeal is DISMISSED for lack of jurisdiction. This Court has jurisdiction over appeals from federal bar admission and disciplinary decisions. In re Calvo, 88 F.3d 962, 965 (11th Cir. 1996). To be appealable, however, an order must either be final or fall into a specific class of interlocutory orders that are made appealable by statute or jurisprudential exception. See 29 U.S.C. [Sections] 1291, 1292; Atlantic Federal Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F.2d 371, 375-76 (11th Cir. 1989). A final decision is "'one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1368 (11th Cir.) (quoting Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911

(1945)), cert. denied, 464 U.S. 893 (1983). The order appealed from in this case is not final [page 2] because, although the district court determined that Bishop could not be disbarred based solely on the state disbarment, it has referred the matter for further independent review and has yet to determine if he will be disbarred.

As an interlocutory decision, the order is not an appealable collateral order because it is not a decision "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949).

Likewise, to the extent Bishop asks us to construe the notice of appeal as a petition for writ of mandamus, the petition is also denied, because Vargas *[sic]* has not shown that his right to issuance of the writ of mandamus is clear and indisputable, nor has he shown exceptional circumstances, or that he has no other adequate means to obtain relief. See Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1004 (11th Cir. 1997); In re Lopez-Luis, 113 F.3d 1187, 1188 (11th Cir. 1997).